Supreme Court, U.S.
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In The
Supreme Court of the United States

HORST SCHWINN, Guardian of Doerte Hesse
and
MARCUS HESSEE, Guardian of Josef Hesse,

Petitioners,

v.

CHARLES STEPHEN EBBETS
and
LONG AND FOSTER REAL ESTATE, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where basic material facts are largely not in dispute, but the inferences which could reasonably be drawn from the facts are in dispute, is a grant of summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure a denial of the right to a jury trial pursuant to Amendment VII of the United States Constitution?

2. Where basic material facts are largely not in dispute, but the inferences which reasonably could be drawn from them and the conclusions to be reached from those facts and inferences are in dispute, is summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure proper?

3. Where Virginia law provides that the test to determine whether a company is an employer for purposes of vicarious liability by respondeat superior is fact specific and generally a jury question involving a four part test with the most significant factor the right to control, is the grant of summary judgment where there is a genuine dispute as to the conclusions from the evidence with regard to the right to control a denial of the right to a jury determination of the issue pursuant to the 7th Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner Horst Schwin is a German citizen, living in Germany, who is the *Guardian ad Litem* for Doerte Hesse, a German citizen living in Germany, who is his daughter and the wife of Josef Hesse. Marcus Hesse is a German citizen, living in Germany, who is *Guardian ad Litem* for Josef Hesse, who is Marcus' father.

Respondent

Respondent Long & Foster Real Estate, Incorporated is a corporation doing business in several jurisdictions, but as is relevant here, in Virginia. Charles Stephen Ebbets is an individual and real estate salesperson for Long & Foster Real Estate, Incorporated, who at all times relevant hereto was acting on the business of Long & Foster Real Estate, Incorporated.

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BRIEF INTRODUCTORY STATEMENT

This case arises out of two separate cases heard together brought by the guardians for two persons severely injured in an automobile/motorcycle collision in Fauquier County, Virginia. Josef Hesse and Doerte Hesse, husband and wife, were involved in a collision when an automobile operated by Charles Stephen Ebbets pulled out in front of them from a stop sign. A suit was filed in the Eastern District of Virginia by the guardians for the respective plaintiffs who are German citizens and were on holiday in Virginia when the devastating injuries occurred. A jury trial was requested by the Plaintiffs. Mr. Ebbets was returning to his office from a property listed with Long and Foster and on Long and Foster business when the collision occurred. He was at all times relevant, a salesperson whose license to sell real estate was issued (by Virginia licensing authorities) to Long and Foster Real Estate, Incorporated and pursuant to supervision by Long and Foster as provided by law and contract. A motion for summary judgment was granted before trial in favor of Long and Foster Real Estate, Incorporated, finding that Ebbets was not its employee, but an independent contractor for tort purposes under Virginia law. A judgment was rendered on behalf of the Plaintiffs collectively in the amount of 36 million dollars against Ebbets. An appeal was taken by the Plaintiffs on the issue of the summary judgment in favor of Long and Foster.

OPINIONS AND ORDERS BELOW

The U.S. District Court for the Eastern District of Virginia entered a memorandum opinion on December 20, 2007, which found that Long and Foster Real Estate, Inc. was entitled to summary judgment on the issue of vicarious liability. (Appendix 15a hereto). The said Court entered final judgment and an order on May 1, 2008, which dismissed the cause as to Long and Foster Real Estate, Inc. based upon the memorandum opinion recited above. (See Appendix 13a and 11a hereto.)

The 4th Circuit Court of Appeals rendered an opinion dated January 25, 2010 and a judgment of the same date which affirmed the ruling of the trial court denying the Plaintiffs a jury trial on the issue of vicarious liability and the control which Long and foster had a right to exercise over Defendant Ebbets. (See App. 8a and 1a hereto.)

The 4th Circuit entered a final order of February 22, 2010, which denied a rehearing and denied en banc hearing. (App. 34a hereto.)

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1332 since the parties were of diverse citizenship (the Plaintiffs being citizens and residents of Germany). The 4th Circuit Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291. On May 21 and May 29, 2008, the Hesses timely noted their appeals to the 4th Circuit Court of Appeals. The Fourth Circuit issued its

opinion and entered final judgment denying the motion for reconsideration and an *en banc* hearing on or about February 22, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. This Petition for a Writ of Certiorari is timely filed.

CONSTITUTIONAL, STATUTORY, PROVISIONS AND RULES INVOLVED

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 56 Provides:

> **(b) By a Defending Party.**
> A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment
> **(c) Time for a Motion, Response, and Reply; Proceedings.**
> (1) These times apply unless a different time is set by local rule or the court orders otherwise:
> (A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and
(C) the movant may file a reply within 14 days after the response is served.
(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.
(d) Case Not Fully Adjudicated on the Motion.
(1) Establishing Facts.
If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.
(2) Establishing Liability.
An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.
(e) Affidavits; Further Testimony.
(1) In General.
A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and

show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond.

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

STATEMENT OF THE CASE

Josef and Doerte Hesse, husband and wife (the "Hesses"), are German citizens and residents and suffered devastating injuries while visiting the United States. They were near Warrenton, Virginia when a Long & Foster Real Estate, Inc. (L&F) salesperson, Charles Stephen Ebbets, pulled his car out from behind a stop sign into the path of an oncoming motorcycle on which the Hesses were riding (the Hesses having the right of way). The serious brain injuries and other injuries sustained by the Hesses were catastrophic and they recovered

judgments totaling $36 million in damages against Ebbets.

Because of a summary judgment ruling made by the District Court before trial, L&F, the company whose business the L&F salesperson was performing at the time of the collision, escaped all liability for the $36 million in damages the Hesse's suffered from their massive injuries. The District Court entered summary judgment dismissing all claims against L&F and allowed the Hesse's to proceed to trial only against the L&F salesperson. The principal question was whether L&F was liable on the theory of vicarious liability applying Virginia law which uses a four part test to determine whether one is an employee for tort purposes emphasizing the issue of right to control.

The District Court concluded that the L&F salesperson was an independent contractor and that L&F had no vicarious liability for the L&F salesperson. The trial Court found that Plaintiffs arguments that the evidence was overwhelmingly in favor of the contrary conclusion was misplaced and drew the wrong inferences/conclusions from the basic facts. As a result, the trial went forward only against the L&F salesperson, Ebbets. Final judgments totaling $36 million were entered against Ebbets on May 1, 2008, and the Hesse's timely noted their appeals to the 4th Circuit Court of Appeals on the issue of granting summary judgment to L&F. The 4th Circuit sustained the findings of the trial court.

LAW AND ARGUMENT
STANDARD OF REVIEW BELOW

The proper standard of review in the Fourth Circuit was to review the district court's grant of summary judgment *de novo*. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Thus, the Fourth Circuit should have viewed the evidence in the light most favorable to the nonmoving party, the plaintiffs, the Petitioners herein. All inferences from the basic facts should be taken favorably to the Petitioners, the non-moving party on the granted summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

ARGUMENT

THOUGH BASIC FACTS MAY BE THE SAME, WHEN THE INFERENCES AND CONCLUSIONS DRAWN ARE IN DISPUTE THERE IS A JURY QUESTION.

Granting Summary Judgment Denied Appellant's the Right to a Jury Trial Where the Basic Facts Could Create in the Minds of Reasonable Jurors Different Inferences and They Could Reasonably Reach Different Conclusions from the Same Basic Facts.

Where basic material facts are largely not in dispute, but the inferences which could reasonably be drawn from the facts are in dispute, a grant of summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is a denial of the right to a jury trial pursuant to Amendment VII of the United States Constitution. Where basic material facts are largely not in dispute, but the inferences which reasonably could be drawn from them and the conclusions to be reached from those facts and inferences are in dispute, summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is not proper and denies a litigant the constitutional right to a jury determination of the issue(s). Where Virginia law provides that the test to determine whether a company is an employer for purposes of vicarious liability by respondeat superior is fact specific and generally a jury question involving a four part test with the most significant factor being the right to control, the grant of

summary judgment where there is a genuine dispute as to the conclusions from the evidence with regard to the right to control is a denial of the right to a jury determination of the issue pursuant to the 7th Amendment to the United States Constitution.

The U.S. Constitution, Amendment VII, guarantees the right to a jury trial in civil cases in which the sum in controversy exceeds twenty dollars. While many federal courts have advanced the idea that Rule 56 of the Federal Rules of Civil Procedure is a procedure which ought to be encouraged to root out cases without any merit and frivolous claims they have also warned of its dangers and possible abuse. The granting of summary judgment effectively denies a party litigant a trial on the merits and particularly when a jury trial is requested, the Court should be hesitant to grant summary judgment. While the Petitioner recognizes that there is merit to resolving cases early and that it is convenient for courts to summarily review matters it is not for a judge to shortcut procedures and deny a party of his constitutional right to a jury determination of the issue. We live in a world where there is much gray and though it is easy to call white or black, gray is an area which is subjective, an area which should be left to a jury to determine. Though it may be easy and convenient for a trial judge to substitute his or her interpretation of basic facts or to reach inferences and conclusions it is not for a trial judge to take the place of the jury. It may be convenient and it may be that most of the time the trial judge may reach the same conclusion that a jury may reach, but it is the right of a litigant to have a jury of peers to decide the facts, to look to the

inferences and reach conclusions from those inferences. The courts ought to be most vigilant against abuse or denial of a right to a jury trial where the case arises by a common law cause of action, particularly when exercising diversity jurisdiction and applying state law.

When facts are not in dispute but there is a dispute as to the inferences and conclusions to draw therefrom and the findings summary judgment is not appropriate and denies the party against whom it is found a right to a jury trial of the facts. Where conflicting inferences can be drawn then the issue should be submitted to a jury. *Hooper v. Sachs*, 618 F. Supp. 963 (1985 D.C. Md.). Where a jury is requested and the parties disagree on the permissible inferences which can be drawn from the basic facts it is improper to grant summary judgment and deny one of the rights to a jury trial. *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265 (5th Cir. 1985), *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978). Where testimony is required about facts giving rise to inferences and conclusions which may be drawn it is not appropriate to grant summary judgment. *SEC v. Murphy*, 626 F.2d 633 (1980). This Court should grant the writ sought to define and set forth guidelines to protect the rights of litigants to their right to a jury trial. Our judicial system is not just about convenience. Convenience would deny cross examination. Convenience would permit summary trials and proffers or even turn our courts to an inquisitory system, but that is not the system our forefathers created, nor is it the system our constitution provides. We have a system which attempts to be fair to all litigants, to protect the

weak so that they may have as even a playing field as is possible, to let them have differences in credibility, intent, and subjective conclusions such as control determined by a jury.

VIRGINIA LAW ON VICARIOUS LIABILITY AND EMPLOYMENT IN THE CONTEXT OF A TORT ACTION.

Virginia recognizes that vicarious liability by respondeat superior in tort cases is determined by what is known as the *McDonald* test. *McDonald v. Hampton Training School*, 254 Va. 79, 81 (1997). The McDonald test sets forth four factors:

McDonald, 254 Va. at 81.

> The factors which are to be considered when determining whether an individual employee or an independent contractor are well established (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual. **The fourth factor, the power to control is determinative. . . . This factor refers to control over the means and method of performing the work. It is immaterial whether the employer exercises this control; the test is whether the employer has the power to exercise such control.**

While the Petitioner recognizes that the trial judges analysis in this case may be a possible view a fact finder may take, there are other conclusions and inferences which a reasonable jury could take from the same basic facts.

"FACTS" SUPPORTING VICARIOUS LIABILITY

Without reviewing every fact presented, the following reviews some of the evidence in a light which creates inferences in favor of the Plaintiffs, petitioners herein, contrary to the conclusions reached by the trial judge...and in favor of vicarious liability applying Virginia's test.

In the case of a real estate broker and agent, the Virginia code and regulations support a finding, that Long and Foster, has not only the right, but the duty, to control the agent. The real estate industry is regulated by the Commonwealth of Virginia. See e.g. Va. Code. § 54.1-2100 (defining a broker) and § 54.1-2101 (defining a salesperson). Based on the statutory scheme, a person cannot be a broker unless they are licensed by the Real Estate Board. Va. Code § 54.1-2106.1(B). A salesperson cannot sell real estate absent a broker. Va. Code § 54.1-2101 and 18 VAC § 135-20-160(D). The regulations promulgated by the Virginia Real Estate Board dictate that every place of real estate business or branch office "shall be supervised by a supervising broker" who shall "exercise reasonable and adequate supervision of the provision for real estate brokerage services by associate brokers and salesperson assigned to the office." 18 VAC § 135-20-160(D).

The regulations further define the required control. The required supervision includes (and indeed also regulated in the contract between Ebbets and Long and Foster), but is not limited to, providing clear guidance on the proper handling of escrow accounts; complying with fair housing laws, negotiating and drafting contracts; property disclosure; and such other matters as necessary to assure the competence of salespersons and other licensees. 18 VAC § 135-20-155 *et. seq.* In fact, a real estate agent/salesperson cannot work in the Commonwealth of Virginia without the supervision and control of a supervising broker. 18 VAC § 135-20-160(D). The license for a real estate sales person is sent to the broker and if the broker is discharged or leaves to go to another broker, his/her license must be returned to the Commonwealth and then can be re-issued to the new broker for that sales person. The sales person cannot work until the license is re-issued to the new broker.

Based on this regulatory scheme, a real estate broker has a non-delegable duty to control his/her salespersons. This duty cannot be abrogated by a contract between the broker and the salesperson. It has long been held in Virginia that

> Selection of the servant, payment of wages, power of dismissal and particularly the power of control, are circumstances to be considered, and are usually decisive, in determining the relation of master and servant; **but where the work to be done involves the exercise of personal and non-**

> **assignable legal duties, no individual or corporation can escape the doctrine of respondeat superior** by transferring to third person the selection and payment and the power of dismissal and control of the servant.

Clinchfield Coal v. Redd, 123 Va. 420, 434, 96 S.E. 836 (1918) (emphasis added); *see also Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992) (holding the property owner liable for the discriminatory actions of his leasing agent, because "the duty of a property owner not to discriminate in the leasing or sale of that property is non-delegable."); *Spainhour v. B. Aubrey Huffman & Assoc.*, 237 Va. 340, 346, 377 S.E.2d 615 (1989)(holding that a statutory rule of law fixes "binding standards which are not left to the exercise of professional judgment. Being rules of law, they are not subject to expert opinions expounding local practices."); *Va. Real Estate Comm. v. Bias*, 226 Va. 264, 269-70, 308 S.E.2d 123, 126 (1983) (broker has absolute duty to convey offer promptly to seller); *State Farm Mutual Auto Ins. v. Floyd*, 235 Va. 136, 144, 366 S.E.2d 93, 97 (1988) (attorney has legal duty to convey settlement offer to client); *see also Wilbanks v. Watson*, 13 Cir. LE12833, 53 Va. Cir. 267 (2000) (The portions of the regulations, which were promulgated by the Board of Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects pursuant to Va. Code Ann. § 54.1-404 (Michie 1998), dictated the standard of care).

In *Clinchfield Coal*, an employer used an officer who was paid by a third-party detective agency to keep order around a coal mining camp. The officer apprehended the plaintiff,[1] and ultimately the warrant was dismissed. The Court concluded that when an owner of an enterprise undertakes to police its own property, "his duties are personal and non-assignable, and where he arranges for and accepts the service he will not be permitted to say the relationship does not exist." *Clinchfield Coal*, 123 Va. at 434.

Further, in *Walker*, there was sufficient evidence that the owner of an apartment had specifically intended that his property manager to apply noniscriminatory policies when renting out his properties. The property manager, however, refused to rent an apartment to the plaintiff solely because she was a woman. The trial court found that the property manager acted outside the scope of her employment, and, therefore, the property owner was not liable. The Fourth Circuit reversed and found the property owner liable on the basis that, "the duty of a property owner not to discriminate in the leasing or sale of that property is **non delegable**." *Walker*, 976 F.2d at 904; *see also Saunders v. General Services Corp.*, 659 F. Supp. 1042, 1059 (D. Va. 1987) ("Courts have followed this rule even where "it seems harsh to punish innocent and well-

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[1] It is not clear what authority this officer had to apprehend an individual. Although apparently, at the time the incident took place, it was a common and well-known practice for mining, manufacturing, and transportation companies to employ special agents who were clothed with police powers. *Clinchfield Coal*, 123 Va. at 431-432.

intentioned employers" because the statutory duty not to discriminate is non-delegable"; *see also Steffan v. Freemason Assocs.*, 60 Va. Cir. 216, 218 (Va. Cir. Ct. 2002) ("When an agreement, considered as a whole, established an agency relationship, the parties cannot effectively disclaim it by formal "consent." "[The] relationship of the parties does not depend upon what the parties themselves call it, but rather in law what it actually is." (quoting *Murphy v. Holiday Inns, Inc.*, 216 Va. 490, 492 (1975); *Chandler v. Kelly*, 149 Va. 221, 231 (1928)).

Similarly, in the case of real estate brokers, the statutory and regulatory scheme unequivocally assigns a non-delegable duty to supervise the salespersons to the broker. There is no statutory or regulatory permission to delegate these duties to another party, including to the salesperson. The label of "independent contractor" is irrelevant, and it is immaterial that Long & Foster may have chosen not to supervise Ebbets. The question is whether Long & Foster had a non-delegable duty to supervise Ebbets. The regulatory scheme explicitly answers that question: Long & Foster had a *per se* duty to control Ebbets. Therefore a reasonable juror may conclude that Long & Foster had the right to control Ebbets. Although it may not be dispositive of the issue of control and vicarious liability, in and of itself, it is certainly a factor to be considered by the jury (fact finder). *See Morvillo v. Shenandoah Mem. Hosp.*, 2008 U.S. Dist. Ct. LEXIS 68595 (W.D. Va.). In the instant case, the specific evidence reinforces this conclusion. Ebbets and all of the Long & Foster witnesses, testified that Ebbets cannot sell real estate without his license being recorded with a

broker, such as Long & Foster. If the relationship between Ebbets and Long & Foster were to terminate, then Long & Foster would return Ebbets license to the Commonwealth. All of the listings, client contacts, and work-product belong to Long & Foster. Thus, Ebbets, has no independent means of working as a real estate salesperson. He cannot bring a contract to another broker or sell for another broker (except in the context of Long and Foster sharing with another broker).

This evidence supports a finding that Ebbets was an employee of Long & Foster, rather than an independent contractor. Although there are no Virginia Supreme Court cases directly on point, Virginia cases have consistently held that real estate salespersons are employees rather than independent contractors. For instance, in *Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 295-296 (Va. 1990), the Virginia Supreme Court held that a real estate agent was an employee for purposes of the Workers' Compensation Act because her contract did not contain a provision that she will not be treated as an employee for federal income tax purposes. This case, however, turned on an interpretation of the Workers Compensation statute. *Barr*, 240 Va. 292, 295-296. The test for whether a person is an employee under the Workers Compensation Act is distinct from that found in *McDonald*. The Court in *Barr* declined the salesperson's invitation to construe the phrase in her contract that she "shall otherwise be deemed to be an independent contractor and not a servant, employee or partner of Broker" in such a manner as to satisfy the specific and unambiguous language contained in the

Workers Compensation Statute, Va. Code § 65.1-4.3. *Barr*, 240 Va. at 295-296.

The Norfolk County Circuit Court reviewed the question of whether a broker would be held liable for the actions of its salespersons in *Steffan*, 60 Va. Cir. 216 (Norfolk 2002).[2] In *Steffan*, the Court thoroughly reviewed the contract and addendum between the broker and the salesperson, the Standard Listing Agreements, and the broker's Policies and Procedure Manual to determine whether or not the broker had the power to control the salesperson. The Court concluded based on the language of these documents, that despite the fact that the label given to the salesperson, the salesperson was the broker's employee.

Similar to the facts in *Steffan*, the Contract between Long & Foster and Ebbets, the Long & Foster Policy Manual, and the actual operation of the Long & Foster office support a holding that Long & Foster had the power to control Ebbets. Ebbets had a written contract with Long and Foster which provided the right of Long and Foster to control Ebbets and the requirement that he adhere to the Policy Manual (unless specifically contradicted by the contract). The policy manual is a manual with specific directions as to how the salespersons must carry out the business of Long and Foster, in excess of 100 page (it is available to the Court if the Court desires it to be produced). The manual details obligations and the control of or right to control Ebbets. And it provides that Long and Foster may

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[2] This decision was not appealed.

in its sole discretion unilaterally change or modify the manual at any time and that Ebbets must abide by the changes with his only remedy to leave (which included him leaving "his' Long and Foster listings and contracts and parts of any commissions for contracts which would be pending. (It may be that Long and Foster chose not to exercise much control because Ebbets was an extremely successful sales agent bringing a great deal of business to Long and Foster, but it is not the actual control, but the right to control.))

The contract between the broker and agent required the agent to work diligently in the sale and lease of all real estate listed with the broker that are made available to agent (not just the agent's listings) and to solicit additional listings and clients "in the name of Broker. See Contract ¶ 4; Ebbets Deposition p. 242 lines 11-15; *Steffan*, 60 Va. Cir. at 219. Ebbets' contract and the Policy Manual require that all suits for commission be brought in the name of Long & Foster. See Contract ¶ 12; Policy Manual pp. 4; Ebbets Deposition pp. 210-215; Brouwer deposition pp. 86-88; *Steffan*, 60 Va. Cir. at 219. Ebbets' contract and Policy Manual contain provisions stating that Long & Foster was to resolve all disputes between salespersons. Furthermore, the Policy Manual required that a sales associate could not file a grievance or complaint against any other real estate salesperson without prior approval of a Long & Foster Branch Manager, Vice-President or General Regional Manager. See Contract ¶ 21(b); Policy Manual p. 15; Nash Deposition p. 118 line 13 - p. 119 line 14; *Steffan*, 60 Va. Cir. at 219. In addition, Long & Foster controlled the manner in

which Ebbets performed his job. Ebbets could work from his home, but could not establish an additional office, without broker approval. Ebbets Deposition p. 243; Nash Deposition p. 124 line 2-20; *Steffan*, 60 Va. Cir. at 219. All monies from real estate transactions went to Long and Foster, who then paid Ebbets a commission after deducting any expenses he owed such as advertising fees, insurance, or other expenses. Ebbets Deposition pp. 109-110; Nash Deposition p. 87 line 15-21. Any monies that were to be placed in escrow by a client of Long & Foster, even though serviced by Ebbets, (and even though perceived to be a client of Ebbets) went into Long and Foster's escrow account. See Contract ¶ 7, Policy Manual pp. 14; Ebbets pp. 117; Nash Deposition p. 76 line 12 - p. 77 line 9; *Steffan*, 60 Va. Cir. at 219. A managing broker in the Long & Foster office was required to review and approve every listing agreement and every contract Ebbets procured (and every listing agreement was with Long and Foster as a party, never Ebbets). Ebbets Deposition p. 63, 73; Nash Deposition p. 13 line 17-18; p. 20; Brouwer Deposition p. 23 line 3-11, p. 27 line 19-21; *Steffan*, 60 Va. Cir. at 219. All of the Long & Foster salespersons were required to purchase Errors and Omissions insurance from a specific company (costs were deducted from the salesperson's commissions). Policy Manual p. 8; Nash Deposition p. 78-79; *Steffan*, 60 Va. Cir. at 220. And Ebbets was required to carry a minimum amount of liability auto insurance while using his vehicle for work purposes. Too, Long and Foster's liability policy provided as named insureds Long and Foster employees, but did not define employees (which under Virginia insurance law in favor of

coverage provides for the broadest construction of the term employee). The Long & Foster Policy Manual dictates that if a salesperson wanted a personal assistant, all personnel functions for that assistant are handled through Long & Foster. Policy Manual p. 62; *Steffan*, 60 Va. Cir. at 220. Ebbets could not accept cash or checks written to him during a settlement or closing on a house, nor could he accept a post-dated check. Nash Deposition p. 23 line 22 - p. 24 line 9; Policy Manual p. 33; *Steffan*, 60 Va. Cir. at 220. The Policy Manual states that salespersons should strongly encourage the purchase of Long & Foster Homeowner Warranty Program to reduce the risk for liability for the salesperson and Long & Foster, Policy Manual p. 19; *Steffan*, 60 Va. Cir. at 220. If the salesperson should get an "Exclusive Right to Sell listing out of his/her service area, it urged that the listing be made a co-Exclusive Right to Sell shared with a Long & Foster associate in the listing's service area. Policy Manual p. 28. A salesperson's business cards, advertising, website had to have the Long & Foster logo present and were subject to approval by Long and Foster. Addendum D to Policy Manual p. 46, 87; See also Brouwer Deposition p. 20-16; Nash Deposition at p. 92 line 7- p. 93 line 19; Policy Manual p. 46; *Steffan*, 60 Va. Cir. at 220. Long & Foster did not allow its salespersons to conduct appraisals (assuming the salesperson had a separate appraiser's license) on their own real estate transactions, and did not allow its salespersons list business opportunities unless the opportunity was connected to real estate, Policy manual pp. 12 and 18. Long & Fosters' Policy Manual also regulated the salespersons regarding

advertising (and all advertising was to be pre-approved), use of the internet, e-mail and telephones, personal dress, and use of alcohol and drugs. Policy Manual p. 10-11, 25, 26, 29 Brouwer Deposition p. 39 line 4 - 40 line 3; Nash Deposition p. 44 line 4 - 45 line 5. Ebbets was subject to termination for failing to use Long & Foster forms for listing agreements, or for using Long & Foster letterhead for personal business. See Policy Manual p. 32.

Long & Foster also owned all of Ebbets' work-product. The listing agreement, the contract were not between Ebbets and the homeowner, but rather between Long & Foster and the homeowner. Policy Manual p. 21. In fact, all office records, files and correspondence are deemed property of Long & Foster. Policy Manual p. 22. Upon a severing of the relationship between Long & Foster and Ebbets, Long & Foster retained all listings, and all contracts. At the request of a seller, Long & Foster might, at its sole discretion release an existing listing contract. Contract ¶ 17, 19, 20(b); Addendum; See also Brouwer Deposition pp. 66 line 14-17.

The listing agreements and contracts reinforce the control that Long & Foster exerts over Ebbets. The Listing Agreements are signed by the managing broker. Although the salesperson is mentioned, it is clearly a contract between Long & Foster and the homeowner. The first line of the agreement stated: "This Agreement is made on _____ by and between (Seller) and Long & Foster, REALTORS (broker)." It is the broker, Long & Foster who is entitled to the exclusive listing, not Ebbets. It is

Long & Foster who is obligated to act as the Seller's agent, the brokerage fee is to be paid to Long & Foster. See Listing Agreement. The agreements also require that the Seller (the client) indemnify Long & Foster. *Steffan*, 60 Va. Cir. 220-221.

And all of the conditions of Mr. Ebbets employment were subject to change. Mr. Ebbets signed acknowledgments that he had read the Policy Manual, and that it was binding. Mr. Ebbets' contract explicitly states that the Policy Manual is subject to change. In fact, Mr. Philips testified that the Policy Manual in effect in 2005 has subsequently been updated and changed. Philips Deposition p. 48. Ebbets signed an acknowledgment that the Policy Manual changed in 2007.

The *Steffan* Court's decision comports with the Supreme Court's holding in *McDonald*. The Virginia Supreme Court found that the exercise of professional judgment, by itself, was no longer an automatic bar to the conclusion that a doctor was an employee. The Court concluded that a jury could find that a doctor was an employee because the Hospital reviewed his performance and instituted rules and regulations binding on the doctor. The Virginia Supreme Court, therefore, remanded the case for a jury determination on the question of vicarious liability. Similarly, in the case of a broker, the determination of whether a salesperson is an employee should be a jury determination.

Furthermore, a real estate salesperson is more akin to "cosignee"/driver of a gasoline distributor in *Texas Company v. Zeigler*, 177 Va.

557, 14 S.E.2d 704 (1941). In *Texas Company*, the cosignee/driver was at fault in a motor vehicle collision. The distributor argued that the cosignee/driver was an independent contractor. The Court disagreed, noting that the contract between the distributor and the cosignee/driver put the driver under a complete system of restraint and power in that the driver was not allowed to do business in his own name, unassociated with that of the company, the paperwork was all on the company's letterhead, and that the driver could not assign his contract with the distributor.[3]

Similarly, in the instant case, all of Ebbets correspondence required Long & Foster letterhead, and/or the presence of the Long & Foster logo. He was required to use Long & Foster listing, sales and contractual forms when he was conducting business. All of these forms had the Long & Foster logo affixed to the top of the form. Ebbets was also clearly not allowed to conduct business in his own name. He could not even function as a real estate salesperson without being licensed through, or having it placed with, a broker, such as Long & Foster. He could not accept money, or checks, in his own name. All

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[3] Internal Revenue Code and regulations also establish a test to determine whether or not a person is an independent contractor or an employee. This test looks at the degree of control of the purported employer and the degree of independence that the worker has. The IRC looks at the level of behavioral control, financial control, the type of the relationship (i.e. permanency of relationship, what benefits the employer gives to the individual, and the extent the services performed are a key aspect of the business). *See e.g. Taylor v. International Union of Journeymen Horseshoers*, 353 F.2d 593 (4th Cir. 1965).

checks were to be written to Long & Foster. Ebbets could not open his own escrow accounts for clients. All listings and contracts needed to be approved by a managing broker at Long & Foster.

The contract alone provided the following elements which may be deemed evidence of control for purposes of finding that Ebbets was an employee for purposes of tort liability and a determination of vicarious liability:

1. Suit for commissions in name of broker;
2. All contracts in name of broker;
3. Associate to fully cooperate with broker for any suit;
4. Associate to have 250/500 Liability insurance and indemnify Broker;
5. Associate bound by Policy Manual except when in direct conflict with contract (But contract amended by document for continuing employment);
6. All listings and contracts in name of Broker;
7. All materials, sales materials, contracts listings, advertising, lists of prospects and clients are property of Broker;
8. Broker to approve all forms and contracts and all other terms of listing agreements;

9. Broker to approve all correspondence relating to transactions;
10. All facilities used are for exclusive benefit of Broker's business;
11. Associate may not use knowledge acquired from business for benefit in any other employment or for benefit of self or any other party (real estate company) and agrees that Broker entitled to an injunction;
12. Agreement is a personal agreement and may not be assigned; and
13. Commissions to be charged shall be determined by the Broker.

Further, in the addendum to the agreement there is a ... "POLICY MANUAL ACKNOWLEDGMENT" signed by Ebbets, which provides:

> "I AGREE TO ADHERE TO THE POLICIES OUTLINED IN THIS MANUAL AS PART OF MY CONTINUED ASSOCIATION WITH LONG AND FOSTER".

There is a dearth of case law addressing this prong of the employee/independent contractor test. The statutory and regulatory scheme, however, seems to support a finding that Ebbets was an employee of Long and Foster. By regulation, a real

estate salesperson may only act under the supervision and control of a supervising broker. 18 VAC § 135-20-160(D). Mr Ebbets cannot work absent engagement by Long & Foster, or some other broker. The broker, therefore, has the right to select and engage its agents, and can choose to reject any agent that it feels is not appropriate to work for Long & Foster. Similarly in *Morvillo v. Shenandoah Mem. Hosp.*, 2008 U.S. Dist. LEXIS 68595, the district court held that the statutory scheme/regulatory scheme which required a CRNA to be supervised by a physician was a factor to be considered by a jury in determining whether there was sufficient control to deem the CRNA an employee of the physician.

Both managing brokers in the Long & Foster office during 2005 testified that they had the power to select salespersons. Mr. Brouwer testified that one of the managing brokers in the office would interview potential salespersons and determine if that person was a good candidate for real estate sales in the Long & Foster office. Brouwer Deposition p. 24 line 4 - 25 line 20. Mr. Nash testified what he would look for in a new salesperson, and described the different interview for someone new to the business as opposed to one coming from another broker. Nash Deposition p. 36 line 9 - 37 line 18. It was clear that the managing broker did not have to accept any person who had passed their licensing examinations. Thus, Long & Foster clearly had discretion in selection and engagement, and this prong of the McDonald test has been met.

The second prong of the *McDonald* test, asks the Court to look at the compensation paid to Ebbets by Long & Foster. Ebbets was paid by commission, and received an IRS form 1099.[4] At first blush, the payment of commissions would seem to be a factor in favor of a finding of an independent contractor, rather than employment. Virginia Courts either do not put too much weight on this prong, or they do not consider the payment of commissions as that different from a wage or salary. In *Texas Company*, the driver/cosignee was paid on a commission basis yet found to be an employee. Moreover, the Virginia Supreme Court concluded that an employee could be paid in the form of commissions or a share of profits. *Unemployment Compensation Commission of Virginia v. Harvey*, 179 Va. 202, 215, 18 S.E.2d 390 (1942). Further, the physician in *McDonald* was paid in a lump monthly sum reported on a 1099 rather than a W-2. The Court, however, did not see this factor as precluding a factual determination that the doctor was an employee. Further, in *Clinchfield Coal Corp.*, 123 Va. 420, a malicious prosecution case, the worker was not even on the defendant's payroll. Rather, he was paid a salary by a third party (the detective agency). Nevertheless, the Court concluded that the worker was the defendant's employee because he "[L]ooked to the defendant, was subject to its orders and directions, and that his principal business was to carry out the wishes and purposes and policy of the defendant." *Clinchfield Coal*, 123 Va. at 433.

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[4] The test for whether someone is an independent contractor for tax purposes, is a distinct test. The factors considered are completely different from the *McDonald* test.

In *Steffan*, the Court found persuasive the fact that the broker received the commission and then transmitted the commission to the salesperson, setting off any amount that the salesperson owes to the broker, and the fact that all suits for commission be brought in the name of the Broker. Thus, the commission that the salesperson earned was derivative of what the broker earned.

This is precisely what occurred in the instant case. Long & Foster paid Ebbets in commission. Ebbets Deposition p. 110-111. Ebbets was responsible for his own withholdings (tax, social security, unemployment). The commissions, however, were never paid directly to Ebbets from customers or from the settlement. Rather, all monies were given to Long & Foster, and then Long & Foster would directly deposit Ebbets' share of the commission into his account after deducting any moneys he had charged to his account, or agent account. Ebbets Deposition at p. 110-111; Nash Deposition p. 87 line 15-21. Ebbets was not allowed to accept a check written to him, nor was he allowed to accept cash. Nash Deposition p. 23 line 22 - p. 24 line 9. In addition, Long & Foster controlled the percentage amount that Ebbets could earn from the sale of real properties. Long & Foster set the percentage rates, and how much a salesperson needed to gross in sales to move between the percentage categories. See Residential Sales Commission Schedules. These rates were subject to change: the schedule in place in 2005 indicated that it superseded all previous schedules and was subject to change.

Thus, despite the form of compensation, the second prong of the McDonald test has been met: Long & Foster employed Ebbets. He was not an independent contractor controlling his own compensation.

The third prong of the McDonald test, the power of dismissal, is linked with the right to control. In *Griffith v. Electrolux Corp.*, 176 Va. 378, 11 S.E.2d 644 (1940) the Virginia Supreme Court concluded that a salesperson was an independent contractor when, along with other factors regarding control of the salespersons activities, there was no absolute power of dismissal In contrast, in *Barber, Admr. v. Textile Machine Works*, 178 Va. 435, 17 S.E.2d 359 (1941) the company had an absolute power of dismissal–it could shift the worker to the inactive list at any time or actually drop him from their rolls, which was actually done after the incident which gave rise to the litigation. Thus, coupled with the right to direct the worker's activities, the Virginia Supreme Court concluded that the worker was an employee rather than an independent contractor. The Power To Terminate a non-assignable personal services contract at will supports reasonable inference of power to control (whether actually exercised or potential) under Virginia law:

> **This power of discharge made obligatory any instructions given**, for it gave to the Press Publishing Company the power to require obedience to those instructions and insured their being carried out. * * *"

Texas Co., 177 Va. at 565, 14 S.E.2d at 707 (emphasis added) (1941) (Virginia Supreme Court).

Indeed, looked at in conjunction with the right to control, the power of dismissal is often deemed a hallmark of the employer-employee relationship. *See Virginia Employment Commission v. A.I.M. Corp.*, 225 Va. 338, 348-349, 302 S.E.2d 534 (1983); *Sinclair Refining Co. v. Unemployment Compensation Commission*, 189 Va. 692, 710 (1949) (finding the employer-employee relationship existed and noting that "His contract may be canceled with or without cause and without notice.") *Texas Company*, 177 Va. at 565 (citing power to discharge on five days notice as a factor for finding employment relationship).

Long & Foster clearly had power to fire Ebbets, or any of its salespersons. This was simply done by returning the salesperson's license to the Real Estate Board in Richmond. Nash deposition p. 29; Brouwer Deposition p. 46 line 16-47 line 4. The Policy Manual clearly anticipates scenarios in which a salesperson could be terminated. A salesperson can be subject to immediate termination for using a Long & Foster form for a real property sale in which Long & Foster was not involved. Policy Manual p. 32. In addition, if a salesperson's use of alcohol, prescription drugs, or over the counter medication impaired the salesperson's ability to work, or if there was any evidence of use of illegal drugs, Long & Foster could discharge the salesperson. Policy Manual p. 11. Mr. Nash further testified that on one occasion he had concerns regarding the driving ability of one his salespersons. He had observed her

hitting another car in the parking lot, and had learned that she had to call into the office for directions to the office. Mr. Nash spoke to her and told her not to drive clients in her car, and suggested that she retire. She left Long and Foster, but Mr. Nash testified that had she not turned in her license he would have terminated her license. Nash Deposition p. 107-108. Thus, it is clear that Long & Foster had to ability to terminate any of its salespersons. The third prong of the *McDonald* test, therefore, has been met. Long & Foster had the power to dismiss Ebbets at any point in time.

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have terminated her license and returned it into the state. Nash Deposition p. 107-108. Thus, it is clear that Long & Foster had to ability to terminate any of its salespersons. The third prong of the *McDonald* test, therefore, has been met. Long & Foster had the power to dismiss Ebbets at any point in time.

CONCLUSION

This Court ought to grant this Petition for a Writ of Certiarrai to define the bounds of summary judgment in a world where the common man is often denied his day in court and his day before a jury of peers as provided by the constitution in the interest of expediency. It is easy for a trial judge to substitute his or her judgment for that of a juror. All persons bring to their view of the world their disparate experiences and often we cannot reconcile how others have a different view, but that is to be protected when a jury rather than a judge decides issues which are subjective, which are subject to interpretation of facts, which are subject different view of the world as comes from the experience of different jurors. This Court should draw a line so it makes clear that though basic facts may not be in dispute, where they are subject to different interpretation, different conclusion and different inference, those cases are not appropriate for summary judgment and deserve the right to a jury trial. Most particularly the court should be cautious in the grant of summary judgment where the cause of action is a common law cause of action arising under state law.

Respectfully submitted,

Steven M. Garver, Esq.
Counsel of Record
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703-471-1090
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garver@garverlaw.com
Counsel for Petitioners

APPENDIX

[ENTERED: JANUARY 25, 2010]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1608

HORST SCHWINN, Guardian Ad Litem of Doerte Hesse,

Plaintiff - Appellant,

and

MARCUS HESSE, Guardian Ad Litem of Josef Hesse,

Plaintiff,

v.

LONG & FOSTER REAL ESTATE, INCORPORATED,

Defendant – Appellee,

and

CHARLES STEPHEN EBBETS,

Defendant.

No. 08-1663

MARCUS HESSE, Guardian Ad Litem
of Josef Hesse,

Plaintiff – Appellant,

and

HORST SCHWINN, Guardian Ad Litem
of Doerte Hesse,

Plaintiff,

v.

LONG & FOSTER REAL ESTATE,
INCORPORATED,

Defendant – Appellee,

and

CHARLES STEPHEN EBBETS,

Defendant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:07-cv-00603-LMB-TCB)

Argued: September 23, 2009
Decided: January 25, 2010

Before MOTZ, Circuit Judge, HAMILTON, Senior Circuit Judge, and Irene M. KEELEY, United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Steven M. Garver, GARVER LAW OFFICES, PC, Reston, Virginia, for Appellants. Danielle D. Giroux, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee. **ON BRIEF:** Douglas K. Landau, ABRAMS LANDAU LTD, Herndon, Virginia; Roger T. Creager, THE CREAGER LAW FIRM, PLLC, Richmond, Virginia, for Appellant Horst Schwinn, Guardian Ad Litem of Doerte Hesse. Stanley P. Wellman, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

The dispute before us grows out of a tragic accident. At approximately 10:30 A.M. on July 23, 2005, while riding their motorcycle in Fauquier County, Virginia, Josef Hesse and his wife, Doerte ("the Hesses"), were struck by a Cadillac Deville sedan driven by a realtor named Charles Stephen Ebbets ("Ebbets"). The Hesses received catastrophic brain injuries as a result of the accident and are incapacitated. Their *guardians ad litem* sued Ebbets individually, and also sued Long & Foster Real Estate, Inc. ("Long & Foster") as Ebbets's employer

under a theory of respondeat superior. The district court entered judgment in favor of Long & Foster after concluding that Long & Foster was not vicariously liable for the Hesses' injuries because Ebbets was not acting as its employee at the time of the accident. Following this, the Hesses proceeded to trial against Ebbets and obtained a verdict for $36 million in damages. They now appeal to us, arguing that the district court erred when it entered summary judgment in Long & Foster's favor. We affirm.

I.

Sometime prior to 2005, Ebbets entered into a Broker-Associate Independent Contractor Agreement ("Agreement") with Long & Foster.[1] As part of this Agreement, the parties contemplated that Long & Foster would provide Ebbets with access to its facilities and listings, and also would assign him a supervising broker as required under Virginia law. The parties further agreed that, in exchange for these benefits, Ebbets, a very successful realtor, would use his best efforts to sell or lease real estate listed by Long & Foster. Throughout their relationship, each party was entitled to receive a percentage of any commissions received from real estate sales closed by Ebbets.

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[1] The independent contractor agreement is not dated. In his deposition, Ebbets stated that he believed he entered into the agreement in 2000, but he was uncertain of this date.

II.

The question before us is whether, under Virginia law, Ebbets, who was returning from a property inspection to Long & Foster's offices in Warrenton, Virginia when the accident occurred, was an employee of Long & Foster or an independent contractor. The Hesses contend that, to resolve this question, we must consider the four factors of (1) selection and engagement, (2) payment of compensation, (3) power of dismissal, and (4) power to control the work of the individual articulated in McDonald v. Hampton Training Sch. for Nurses, 486 S.E.2d 299, 301 (Va. 1997). Of these, they assert the power to control is determinative, and that the provisions of Virginia law requiring brokers to supervise real estate salespersons impose a legal duty on brokers to control the realtors they supervise. See Va. Code Ann. § 54.1-2101 (2009); 18 Va. Admin. Code § 135-20-160(D) (2009). They also argue that the limitations and requirements imposed on Ebbets under the Agreement, and the circumstances of his relationship with Long & Foster, could allow a jury reasonably to infer that Long & Foster had the power to control the means and methods of his sales efforts and performance as a realtor.

Long & Foster disputes this, arguing that, both under Virginia law and the terms of the Agreement, Ebbets was an independent contractor. It contends the licensing regulations of the Virginia Real Estate Board that require all realtors to be supervised by a licensed real estate broker cannot

create a *de facto* master-servant relationship.[2] This is because § 54.1-2101 defines "real estate salesperson" in part, as a person "affiliated as an independent contractor with[] a real estate broker . . . ." According to Long & Foster, to hold that Virginia's Administrative Code imposes a duty on brokers to control the realtors they supervise would eviscerate the Virginia General Assembly's statutory expectation that a broker may supervise a realtor working as an independent contractor to the broker. Finally, Long & Foster points to terms in the Agreement that expressly forbade it from controlling the means and manner of Ebbets's work as a realtor, terms it honored throughout its relationship with Ebbets.

After considering these arguments in the parties' cross-motions for summary judgment, the district court granted summary judgment to Long & Foster. In a well-reasoned opinion that thoroughly analyzed applicable Virginia law, as well as the Agreement between Long & Foster and Ebbets, the district court concluded that Ebbets was acting as an independent contractor at the time of the accident. It therefore granted summary judgment on the basis that Long & Foster neither controlled nor had the power to control Ebbets's work as a realtor. Hesse v. Ebbets, 2007 WL 4562818 (E.D. Va. 2007).

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[2] Virginia regulations require supervising brokers to "exercise reasonable and adequate supervision of the provision of real estate brokerage services by associate brokers and salespersons assigned to the branch office." 18 Va. Admin. Code § 135-20-160(D)

III.

We review a district court's entry of summary judgment *de novo*, drawing all inferences in the light most favorable to the non-moving party. Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991). After careful consideration of the record, the briefs and oral arguments, and the record before us, we affirm on the basis of the district court's well-reasoned opinion.

AFFIRMED

[ENTERED: JANUARY 25, 2010]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1608(L)
(1:07-cv-00603-LMB-TCB)

HORST SCHWINN, Guardian Ad Litem of Doerte Hesse,

Plaintiff – Appellant

and

MARCUS HESSE, Guardian Ad Litem of Josef Hesse,

Plaintiff

v.

LONG & FOSTER REAL ESTATE, INCORPORATED,

Defendant – Appellee

and

CHARLES STEPHEN EBBETS,

Defendant

No. 08-1663
(1:07-cv-00603-LMB-TCB)

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Plaintiff – Appellant

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Plaintiff

v.

LONG & FOSTER REAL ESTATE, INCORPORATED,

Defendant – Appellee

and

CHARLES STEPHEN EBBETS,

Defendant

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED: MAY 1, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MARCUS HESSE, Guardian of
JOSEF HESSE,

and

HORST SCHWINN, Guardian of
DOERTE HESSE,

Plaintiffs,

v. No. 1:07cv603 (LMB)

CHARLES STEPHEN EBBETS, et al.,

Defendant.

ORDER

For the reasons stated in the Court's order of March 27, 2008, it is hereby

ORDERED that a judgment of $15 million ($15,000,000.00) be and is entered in favor of plaintiff Marcus Hesse, Guardian of Josef Hesse, against defendant Charles Stephen Ebbets, and it is further

ORDERED that a judgment of $21 million ($21,000,000.00) be and is entered in favor of

hwinn, Guardian of Doerte Hesse,
Charles Stephen Ebbets.

o Fed. R. Civ. P. 58, the Clerk is
r judgment in favor of plaintiffs
t Ebbets and to enter judgment in
nt Long and Foster. The Clerk is
to remove this matter from the
2008 and forward copies of this
of record.

is 1st day of May, 2008.

nia

/s/
ie M. Brinkema
ed States District Judge

BEST AVAILABLE COPY

[ENTERED: MAY 1, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MARCUS HESSE, Guardian of
JOSEF HESSE,

and

HORST SCHWINN, Guardian of
DOERTE HESSE

Plaintiffs

v. Civil Action No. 1: 07cv603

CHARLES STEPHEN EBBETS, et al.

Defendants

JUDGMENT

Pursuant to the order of this Court entered on May 1, 2008 and in accordance with Federal Rules of Civil Procedure 58:

JUDGMENT is hereby entered in favor of plaintiff, Marcus Hesse, Guardian of Josef Hesse, against defendant, Charles Stephen Ebbets, in the amount of $15 million dollars ($15,000,000.00).

JUDGMENT is hereby entered in favor of plaintiff, Horst Schwinn, Guardian of Doerte Hesse, against defendant Charles Stephen Ebbets, in the amount of $21 million dollars ($21,000,000.00).

JUDGMENT is hereby entered in favor of defendant, Long and Foster Real Estate, Inc.

FERNANDO GALINDO, CLERK

By: /s/
Deputy Clerk

May 1, 2008
Alexandria, Virginia

[ENTERED: DECEMBER 20, 2007]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MARCUS HESSE, Guardian of
JOSEF HESSE, et al.

Plaintiffs,

v. No. 1:07cv603 (LMB)

CHARLES STEPHEN EBBETS, et al.

Defendants.

MEMORANDUM OPINION

In this personal injury action, the plaintiffs seek to impose liability on the defendant Long and Foster Realty, Inc. ("Long and Foster"), for an automobile accident allegedly caused by the defendant Charles Stephen Ebbets. They contend that, at the time of the accident, Ebbets was acting as an employee of Long and Foster, rendering Long and Foster responsible under a theory of respondeat superior. The parties have filed cross motions for summary judgment on this issue. For the reasons stated in open court as amplified in this memorandum opinion, the Court has granted Long and Foster's motion for summary judgment and

denied the plaintiffs' motions for summary judgment.[1]

Background

The parties do not dispute that on July 23, 2005 at around 10:30 a.m. in Fauquier County, defendant Ebbets, a real estate salesman, was driving north on Route 688 in his Cadillac DeVille sedan. He had just visited one of his property listings and, after noticing that the "for sale" sign and information box were missing, decided to drive to Long and Foster's Warrenton office to collect replacements. While attempting to cross the intersection of Route 688 and Route 55, Ebbets's car hit a motorcycle, critically injuring the driver, Josef Hesse, and his wife, Doerte Hesse, who was riding as a passenger. At the time of the accident, Ebbets was a highly successful, long-time associate with Long and Foster, selling real estate under a "Broker-Associate Independent Contractor Agreement."

Both Josef Hesse and Doerte Hesse are presently incapacitated. Their guardians have brought this personal injury suit on their behalf.[2]

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[1] This memorandum opinion addresses only the issue of respondeat superior. The plaintiffs also moved for summary judgment with respect to the liability of Ebbets. As explained in open court, the Court denied that motion, as there are material issues of fact in dispute.

[2] On September 14, 2007, Marcus Hesse and Horst Schwinn were appointed to act as guardians ad litem for Josef Hesse and Doerte Hesse, respectively.

Standard of Review

Under Fed. R. Civ. P. 56, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In ruling on a motion for summary judgment, a court should accept the evidence of the nonmovant, and all justifiable inferences must be drawn in his or her favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The parties have stipulated that there are no issues of fact in dispute regarding Ebbets's contractual relationship with Long and Foster. Having thoroughly reviewed the parties' exhibits and deposition transcripts, the Court agrees with this characterization of the evidence. The only question is whether, in light of the undisputed evidence, Ebbets was acting as an employee or as an independent contractor of Long and Foster.

Discussion

To impose liability on Long and Foster, plaintiffs must show that Ebbets was functioning as an employee, and not as an independent contractor, when he engaged in his allegedly negligent conduct. Virginia looks to the following factors to distinguish an independent contractor from an employee: "(1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual." McDonald v. Hampton Training Sch. for Nurses, 486 S.E.2d 299,

301 (Va. 1997). Of the four factors, "the power to control" is determinative. Id.

Plaintiffs offer two arguments to support their position that Ebbets was a Long and Foster employee. First, they broadly contend that under Virginia law real estate salespersons are always "employees" of their real estate broker. Second, they argue that Ebbets was an employee based on the specific characteristics of his relationship with Long and Foster.

1. Virginia Law Governing Real Estate Salespersons

Under Virginia law, an individual or entity that sells, buys, or negotiates the purchase or sale of real estate is a "real estate broker." Va. Code. § 54.1-2100. A "real estate salesperson" has an identical function, except he must first affiliate with a broker before engaging in his profession. See § 54.1-2101. Both positions require licenses from the Virginia Real Estate Board. See § 54.1-2106.1(B), (C).

Various regulatory obligations inure to each party once a broker-salesperson relationship is consummated. To avoid a conflict of interest, the salesperson must not accept compensation from any broker other than his principal broker, nor act as an agent for a client outside his broker's firm. See 18 Va. Admin. Code §§ 135-20-270, 135-20-280(2). The salesperson must also identify the name of the licensed broker with whom he is associated on all advertisements. §§ 135-20-190, 135-20-290(4).

In turn, the licensed broker must "exercise reasonable and adequate supervision of the provision of real estate brokerage services by ... salespersons." § 135-20-160(D). The broker must also provide guidance on the handing of escrow deposits, compliance with state and federal laws, negotiation and drafting of contracts, mandatory disclosures of the conditions of property, and advertising. Id. Finally, Virginia has adopted extensive regulations concerning escrow accounts and financial records. The broker must maintain, and the salesperson must utilize, escrow accounts for deposits and down payments in real estate transactions. § 135-20-180. The broker must also possess a complete record of financial transactions conducted by his firm. § 135-20-185.

Plaintiffs repeatedly invoke these statutory provisions to show Long and Foster's authority to control Ebbets. Specifically, plaintiffs argue that because Virginia law vests a broker with these legal responsibilities for its salespersons, its salespersons are a fortiori employees of their broker.

Plaintiffs' argument fails to address the statutory definition of "real estate salesperson," which explicitly includes "independent contractor":

> [A]ny person, or business entity of not more than two persons . . . who for compensation or valuable consideration is employed either directly or indirectly by, or affiliated as an independent contractor with, a real estate broker, to sell or offer to sell, or to buy or offer to

> buy, or to negotiate the purchase, sale or exchange of real estate, or to lease, rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon.

Va. Code § 54.1-2101 (emphasis added). The Virginia Real Estate Board employs this distinction in its regulations as well. See, e.g., 18 Va. Admin. Code § 135-20-10. Given the clear meaning of the term "independent contractor" in modern legal parlance, the Court must presume that the use of the term in the statute demonstrates the Virginia General Assembly's endorsement of the employee/independent-contractor distinction in the real estate profession. Acceptance of plaintiffs' position would read the phrase "affiliated as an independent contractor" out of the statute.

Second, plaintiffs conflate the duty of supervision with the power to control. Although Long and Foster had a general duty to ensure that its salespersons complied with statutory and administrative regulations under the Virginia statutory scheme, these statutory requirements and administrative regulations do not implicate "the means and method of performing the work." McDonald, 486 S.E.2d at 301. They do not dictate the nature of the salesperson's relationship with his broker, only that he may associate with one broker. They do not control the specific content of a salesperson's advertising other than requiring that the salesperson identify his affiliated broker. They do not fix the percentage of the commission,

regulating only how it is to be transmitted after the contract is finalized.

Contrary to plaintiffs' suggestion, the Virginia statutory scheme does not create a de facto master-servant relationship between a real estate broker and a salesperson. Instead, these regulations set out broad boundaries within which salespersons may operate and place the onus on the brokers to ensure compliance. They do not, however, implicate the time, place, and manner in which a salesperson may solicit buyers, negotiate a deal, or execute an agreement. Whether a particular salesperson is an employee of a broker or affiliated as an independent contractor turns on the unique circumstances of the salesperson's relationship with his broker.

2. Ebbets's Written Contract With Long and Foster

The Virginia Supreme Court has offered the following guidance on the "power to control" inquiry:

> [T]he rule of respondeat superior rests on the power of control and direction, which must be as proprietor, in the sense of stopping the work or of continuing it, and determining the way it shall be done, with reference to the method of reaching the result, and not merely the result to be reached ....

Coker v. Gunter, 63 S.E.2d 15, 16 (Va. 1951); see also Norfolk & W. Railroad Co. v. Johnson, 154 S.E.2d 134, 136 (Va. 1967) ("[T]he crucial question is

whether the Railroad had the right to control not merely results but the progress and details of the work."). The employing party need not have actually exercised this control, so long as it retained the discretion to do so. See McDonald, 486 S.E.2d at 301.

To ascertain the relationship between Long and Foster and Ebbets, the Court must "examine the written contract between the parties and the evidence concerning performance under that contract." Richmond Newspapers, Inc. v. Gill, 294 S.E.2d 840, 843 (Va. 1982). When these sources are considered, the Court easily concludes that Ebbets was acting as an independent contractor on the day in question.

The title of the contract, "Broker-Associate Independent Contractor Agreement," clearly demonstrates that the intent of the parties was to establish an independent contractor rather than an employer/employee relationship.

Furthermore, Clause Five of the independent contractor agreement sets forth the limited extent of Long and Foster's control over how Ebbets was to perform his work:

> CERTAIN RESPONSIBILITIES. Associate agrees to work diligently and with his/her best efforts to sell, lease or rent any and all real estate listed with Broker in jurisdictions where Associate is licensed, to solicit additional listings, clients and customers for said Broker, and otherwise to serve the public in real

> estate transactions and to promote the mutual benefit of the parties. . . . Associate shall not, however, be required to maintain any fixed schedule or minimum number of hours of work; while Associate shall not be required to attend any sales training or similar meetings, Associate is encouraged to do so in order for Associate to maintain his/her professional competency.

The import of the provision is clear. Long and Foster had no authority to control Ebbets' schedule, to insist that he carry a minimum workload, or to command his presence at company meetings Rather, it could only demand his best efforts to solicit listings, clients, and contracts - i.e., the end product. This hands-off association is the sine qua non of an independent contractor relationship.

When pressed to explain this language at oral argument, counsel for plaintiff Josef Hesse repeatedly insisted that Long and Foster could alter its Policy Manual at a whim and demand Ebbets' participation at meetings, insist on his presence at the office, and mandate that he perform minimum monthly hours or sales.[3] This position ignores Clause Eighteen of Ebbets's contract, which explicitly identifies the contract, not the Policy Manual, as the document governing Ebbets's obligation and states that any conflict between the contract and the Policy

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[3] The Policy Manual's provisions, which are binding on salespersons, are "subject to change in the overall best interests of Long & Foster."

Manual shall be resolved in favor of the contract.[4] An attempt by Long and Foster to mandate that Ebbets accept a fixed work schedule would violate the clear language of Clause Five.

Finally, the contract contains broad indemnification provisions in Clauses Nine and Thirteen. In a traditional master-servant relationship, the master indemnifies the servant for any action taken on his behalf. See Restatement (Second) Torts § 886B(2)(b). Put succinctly, the master accepts liability in exchange for his power to control. However, Long and Foster's relationship with Ebbets presents the opposite scenario. Under his contract, Ebbets agreed to indemnify Long and Foster for his conduct as a salesperson, explicitly including any liability arising out of Ebbets' operation of his vehicle.

A plain reading of these indemnification provisions with Clause Five shows that Long and Foster expressly disclaimed any power to control the means and manner in which Ebbets sold real estate and that Ebbets expressly granted broad indemnification to Long and Foster for the means and manner of his real estate sales. The Court finds this circumstance to be strongly, if not conclusively, indicative of an independent contractor relationship.

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[4] Clause Eighteen provides: "In the event there is any such conflict between said Long & Foster Real Estate, Inc., Policy Manual, written Company memoranda and this Agreement, then this Agreement shall control but only to the extent of any such conflict."

3. Long and Foster's Policies and Practices

The Court's conclusion is confirmed by an examination of Long and Foster's policies and practices with respect to its salespersons, or "associates," at the time of the accident. Each associate set his own hours. Long and Foster did not require an associate's presence in the office, nor did it keep track of when he was in the office. Brouwer Dep. 44; Ebbets Dep. 56. Also, Long and Foster did not keep track of its associates' appointments schedules. Brouwer Dep. 81-82. The managing broker would conduct periodic informal reviews with his associates, but did not get involved in their day-to-day activities. Brouwer Dep. 108, 115.

Long and Foster did not have rules or guidelines about the display of properties or the solicitation of new customers. Each individual associate could decide how to advertise properties and how to solicit clients. Brouwer Dep. 19. Unless pre-approval was secured from the managing broker, the associate was financially responsible for any work or improvements ordered on a property listing. PM 30.

Associates generated their own listings. Nash Dep. 13. The seller and associate would negotiate the listing contracts. Only at a later point in the process would the managing broker review the contract and sign it. Nash Dep. 18-19.

Long and Foster did not issue work assignments to its associates. Although some associates performed "desk duty," which involved

handling general phone inquiries to the office, the desk duty was voluntary. Nash Dep. 127. Long and Foster did not restrict its associates to particular territories to avoid competition. Brouwer Dep. 16; PM 28.

Long and Foster provided boilerplate forms drafted by the Northern Virginia Association of Relators in accordance with state and federal laws. Brouwer Dep. 23-24, Nash Dep. 120-21. Although associates were encouraged and/or instructed to use those forms to ensure compliance and efficiency, they could insert special modifications or contingencies when necessary. Brouwer Dep. 132-33; Nash Dep. 22-23, 121. Long and Foster would review all contracts to ensure that the required information was present. Brouwer Dep. 23; Nash Dep. 20.

Although Long and Foster provided associates with "for sale" signs, which displayed the associate's name and "Long and Foster," the associates bore the sole responsibility of maintaining these signs and any brochure boxes placed on their properties. Brouwer Dep. 77-78. Associates were free to contract with third parties to perform these services. Brouwer Dep. 80; Ebbets Dep. 125-26. The decision to use a lock box was left to the associate, who was responsible for purchasing or leasing it. Brouwer Dep. 91; PM 30.

An associate could take out individual advertisements in local newspapers and magazines, so long as he identified his affiliation with Long and Foster as his licensed broker. Brouwer Dep. 110,

112. Long and Foster retained the right to review this advertising. PM 29.

Associates used their own vehicles to conduct business. Ebbets Dep. 100. Company policy (and the associate's contract) required that an associate keep a minimum liability policy of $250,000 per person, $500,000 per accident. PM 9.

Although Long and Foster established minimum commissions for real estate transactions, PM 39, in practice, managers allowed associates to negotiate their own commission rates for each listing. Brouwer Dep. 22; Nash Dep. 75; Ebbets Dep. 113. Long and Foster then took a percentage of that commission as set out in the Commission Schedule. It did not award any other compensation or bonuses, Nash Dep. 37.

Under Ebbets' contract, either party could terminate the relationship at any time by written notice. If Ebbets's affiliation with Long and Foster ended, his license would be returned to the Virginia Real Estate Board, which could then reassign it to another licensed broker. Nash Dep. 29. His sales contracts would remain with Long and Foster, but he would receive his full commission. Nash Dep. 38.

Each associate could maintain an expense account with Long and Foster for advertising, expenses, and errors and omissions insurance. Brouwer Dep. 95. However, he could also purchase these items directly. Id. If expenses were billed to the expense account, Long and Foster would deduct

the amount from the associate's commission.[5] Nash Dep. 110.

As a matter of state law, associates were required to attend continuing education courses. Although Long and Foster made such courses available, it did not mandate them. An associate could register for any company's course, so long as it was state approved. Nash Dep. 41. Also, Long and Foster charged a fee to its associates to attend its seminars. Nash Dep. 42. It did not keep track of its associates' hours. Brouwer Dep. 40-41.

Long and Foster offered associates the ability to use its internet site and a company email address, however, associates were permitted to use third party websites instead, and many did. Brouwer Dep. 31.

Although Long and Foster retained some control over the working conditions of its associates, much of which was mandated by state law, its associates retained substantial authority to conduct their sales activities - to choose their work hours, to select their clients, to generate their listings, to display their properties, to advertise their services, and to close deals.[6] Long and Foster reviewed their

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[5] Long and Foster did reimburse its associates for certain expenses - postage, long distance telephone calls, tuition for license, and customer gifts under $5. See Policy Manual 46.

[6] Of particular note, "associates are free to farm any area they wish." PM 28. If it had the "power to control" its associates' affairs, as plaintiffs contend, one would expect a more centralized effort by Long and Foster to coordinate its associates' efforts.

contracts to ensure compliance with state law and company policies, but it had almost no involvement in the day-to-day work of its salespersons.

Plaintiffs' repeated hypotheticals about how Long and Foster might revise its policies in the future to demand greater control over its salespersons are unhelpful. Although the Long and Foster policy manual was subject to revision at any time, the Court must examine the policies and practices in existence at the time of the accident. See Coker, 63 S.E.2d at 16 ("The answer, as we shall see, is to be found by ascertaining which one had the power of control over Minggia at the time of the accident.") (emphasis added).

Plaintiffs' other citations to Long and Foster policies in effect at the time of the accident are not persuasive. Those policies are, at best, tangential to the work of a salesperson or are taken out of context. For example, plaintiffs repeatedly highlight company policies that prohibited associates from conducting real estate business for another broker and required them to identify "Long and Foster" in advertisements. As discussed above, Virginia law requires salespersons to affiliate with a licensed broker when conducting their affairs and identify that affiliation. These Long and Foster policies simply define who Ebbets can work for, but say nothing about the time, place, and manner in which he conducts his business. With respect to the advertising policies, there is no evidence in the record to show that Long and Foster ever exercised any control beyond ensuring that its name and logo were properly displayed.

Plaintiffs also argue that Long and Foster required its associates to carry errors and omissions insurance and auto insurance, to dress appropriately, and to not use alcohol or drugs in the work place. The Court does not find that these policies materially constrain the manner in which an agent conducts his business other than to impose minimum standards of conduct that are generally accepted in any professional environment, not unique to the real estate field.[7]

Plaintiffs also emphasize that salespersons were expected or instructed to use stock forms when drafting their listing and sales contracts. Again, plaintiffs fail to explain how, through these forms, Long and Foster controlled its associates' activities. The forms provided boilerplate language, designed to ensure that the contract complied with applicable laws and contained all the essential terms of a contract. It is undisputed that agents retained authority to insert modifications or contingencies. See Nash Dep. 121.

Finally, at oral argument and in his brief, counsel for Doerte Hesse recited a long list of Long and Foster policies relating to its salespersons' use of the company-provided office, phones, copiers, computers, etc., which require, for example, the

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[7] In a similar vein, plaintiffs highlight Long and Foster's policy of preventing telephone solicitations before 8 a.m. or after 9 p.m., prohibiting the use of automatic dialing systems, and requiring each office to maintain a "Do Not Call" list. See PM 16. These policies were enacted to comply with the basic requirements of the Telephone Consumer Protection Act, see 47 U.S.C. § 227, and do not materially constrain the work of a salesperson.

salesperson to document his presence after normal business hours, turn off the lights upon leaving the office, accurately transfer phone calls, avoid parking in spots frequented by customers, and limit personal phone calls. Counsel also emphasized Long and Foster's right to monitor associates' emails and internet activity when using their <longandfoster.com> accounts.

These policies do not advance the plaintiffs' position because Long and Foster did not require associates to use the services and tools to which they applied. In other words, use of Long and Foster's office, computer, and phones was optional. If an associate chose to use the computer, he had to follow the rules. That Long and Foster retained the power to control these services does not mean that it also retained the power to control the associate.

The "power to control" inquiry looks not at the product of the salesperson's work, but whether the company controlled the manner of the work. When the record is viewed in its entirety, it is abundantly clear that "the time, means and method of doing [the work] were under [the] exclusive control" of the agents. Coker, 63 S.E. 2d at 755. For these reasons, the Court has concluded that at the time of this very tragic accident, Ebbets was not acting as an employee of Long and Foster and, therefore, Long and Foster has no liability for his conduct.

Request for Interlocutory Appeal

Plaintiffs have orally requested that the Court certify its summary judgment ruling for

interlocutory appeal. Long and Foster has filed a motion opposing that request. The Court will deny plaintiffs' request because resolution of the question of respondeat superior is not "a controlling question of law" whose resolution would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(c). Ebbets contests liability and the amount of damages, and the outcome of either could moot the need for an appeal. Furthermore, the Court sees no basis for finding a "substantial ground for a difference of opinion" on the legal principles discussed in this opinion.[8] Id.

Outstanding Discovery and Trial Issues

The Court is well aware of the difficulties incurred by all parties in fixing the magnitude of plaintiffs' injuries. Plaintiffs, who are significantly impaired, are presently in Germany and under the care of German doctors. Many of their medical records are in German. These circumstances will require the remaining parties to expend significant time and money in arranging for foreign depositions and in locating medical experts who can faithfully translate plaintiffs' records.

The Court also recognizes the need for prompt adjudication of the liability issue. Nearly two and one-half years have passed since the accident, and

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[8] For similar reasons, the Court exercises its discretion and refuses to direct entry of final judgment under Fed. R. Civ. P. 54(b) as to Long and Foster. See Cantor v. Cohen, 442 F.3d 196, 198 (4th Cir. 2006) (emphasizing the district court's discretion in issuing certifications under Rule 54(b))

both parties are relying on live testimony to advance their theories of the case.

For these reasons, the Court will, in its discretion, bifurcate the proceedings. All discovery on damages will cease. Instead, the Court will set a prompt jury trial on the issue of liability. If the jury finds in favor of the plaintiffs, the Court will allow a brief period for settlement efforts. If the parties are unable to settle, discovery on the damages issue will be reopened, and a trial solely on the issue of damages will then be scheduled.

A separate order consisted with this opinion will be entered.

Entered this 20th day of December, 2007.

/s/
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

[ENTERED: FEBRUARY 22, 2010]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1608(L)
(1:07-cv-00603-LMB-TCB)

HORST SCHWINN, Guardian Ad Litem of Doerte Hesse,

Plaintiff – Appellant

and

MARCUS HESSE, Guardian Ad Litem of Josef Hesse,

Plaintiff

v.

LONG & FOSTER REAL ESTATE, INCORPORATED,

Defendant – Appellee

and

CHARLES STEPHEN EBBETS,

Defendant

No. 08-1663
(1:07-cv-00603-LMB-TCB)

MARCUS HESSE, Guardian Ad Litem of Josef Hesse,

Plaintiff – Appellant

and

HORST SCHWINN, Guardian Ad Litem of Doerte Hesse,

Plaintiff

v.

LONG & FOSTER REAL ESTATE, INCORPORATED,

Defendant – Appellee

and

CHARLES STEPHEN EBBETS,

Defendant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Senior Judge Hamilton and Judge Keeley.

For the Court

/s/ Patricia S. Connor, Clerk

(2)

No. 09-1423

In The

Supreme Court of the United States

HORST SCHWINN, Guardian ad Litem of Doerte Hesse, et al.,

Petitioners,

v.

CHARLES STEPHEN EBBETS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the absence of any material facts in dispute concerning the relationship between two parties, may a District Court properly rule, as a matter of law pursuant to Rule 45 of the Federal Rules of Civil Procedure, that one party was an independent contractor for whose negligence the other party could not be held liable?

2. Does Virginia's statutory requirement that a broker must supervise a real estate agent create a *de facto* employer-employee relationship, even where the statute provides that the agent may be an independent contractor?

3. Does a real estate agent's status as an independent contractor present a genuine dispute over a material fact precluding summary judgment if the nature of the broker's supervision over the agent does not relate to the "means and methods" of the agent's work?

PARTIES TO THE PROCEEDING

The Petitioners in this case are Horst Schwinn, Guardian of Doerte Hesse, and Marcus Hesse, Guardian of Josef Hesse. The Respondents are Long and Foster Real Estate, Inc. and Charles Stephen Ebbets.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29, Respondent Long and Foster Real Estate, Inc. states as follows:

1. Long and Foster's parent corporation is The Long & Foster Companies, Inc.

2. There are no publicly held companies that own 10% or more of stock of Long and Foster.

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COUNTERSTATEMENT OF THE CASE

This action arises out of a motor vehicle collision involving Charles Stephen Ebbets ("Ebbets"), Josef Hesse and Doerte Hesse ("the Hesses"). The Hesses filed a personal injury action against Ebbets and Long and Foster Real Estate, Inc. ("Long and Foster") in the United States District Court for the Eastern District of Virginia, Alexandria Division, alleging that Ebbets' negligence caused the collision and the Hesses' injuries. The Hesses also asserted that Long and Foster should be held liable for Ebbets' alleged negligence under a theory of *respondeat superior*, arguing that, at the time of the accident, Ebbets, a licensed real estate agent, was an employee and/or agent of Long and Foster working in the scope of his employment.

The parties filed cross motions for summary judgment on the *respondeat superior* issue.[1] The District Court denied the Hesses' motions for partial summary judgment and granted Long and Foster's motion for summary judgment, finding that Ebbets was not acting as an employee of Long and Foster at the time of the accident and, therefore, Long and Foster had no liability for his conduct. The case proceeded against Ebbets on damages only, and after a bench trial, the District Court entered an order awarding judgment in the Hesses' favor. The Hesses appealed this order to the Fourth Circuit Court of Appeals, which affirmed the District Court's well-reasoned opinion. The Hesses then filed a Petition

[1] The Hesses also asked the District Court to rule that Ebbets was negligent as a matter of law. The District Court denied this motion

for Rehearing and Rehearing *En Banc*, which was denied.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 provides that a petition for a writ of certiorari will be granted only for compelling reasons; however, the Hesses' Petition does not ask this Court to resolve a conflict within the circuit courts of appeals or address an important federal question that conflicts with a decision by a state court of last resort. The Rule further states that a petition for a writ of certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," yet this is precisely what the Hesses ask this Court to review on appeal. In essence, the Hesses' position is nothing more than an indictment of the summary judgment procedure. As there is no compelling reason for this Court to review the Fourth Circuit's opinion affirming the District Court's decision to grant summary judgment in favor of Long and Foster, the Petition should be denied.

I. Given the Absence of Any Material Facts in Dispute, the Issue of Whether Ebbets is an Independent Contractor was a Matter of Law for the District Court to Decide

The Hesses assert that the District Court, in granting Long and Foster's Motion for Summary Judgment, failed to view the evidence in the light most favorable to the Hesses. They contend that the District Court should have submitted the *respondeat*

superior issue to the jury, and the jury could have drawn different inferences based upon the evidence, and concluded that Ebbets was an employee of Long and Foster. This contention is contrary to the concessions by made the Hesses at the summary judgment hearing before the District Court.

The District Court acknowledged that whether a person is an employee or an independent contractor is generally a question of fact for the jury to determine; however, based upon the evidence before the District Court, there were no material issues of fact in dispute. At the summary judgment stage, the facts must be viewed in the light most favorable to the nonmoving party **only** if there is a genuine dispute as to those facts. *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007). Given the absence of any disputed material facts, the District Court suggested that the independent contractor issue was a legal conclusion upon which the District Court could properly rule.

When specifically asked by the District Court whether this was a correct assessment of the procedural posture of the case, the Hesses agreed. Having made no objection to the District Court's conclusion that the only issue before the Court was a question of law for the Court to decide, the Hesses cannot be permitted to do so on appeal. If there were disputed material facts that could be inferred from the evidence that raised a factual issue for the jury to decide, it was incumbent upon the Hesses to raise the issue and provide the District Court with an opportunity to consider the alleged reasonable inferences and rectify the effect of the asserted error.

In light of the Hesses' concession at the summary judgment hearing that there were no disputed issues of material fact as to Ebbets' status as an independent contractor, it was within the province of the District Court to rule that Ebbets is an independent contractor as a matter of law for whose negligence Long and Foster could not be held liable.

In addition, only **reasonable** inferences need be considered by the District Court. *Sylvia Development Co. v. Calvert County, Maryland*, 48 F.3d 810, 818 (4th Cir. 1995). Whether an inference is reasonable cannot be decided in a vacuum; it must be considered in light of the competing inferences to the contrary. *Id.* The District Court properly considered all reasonable inferences that could be drawn from the material facts and ruled upon a question of law. *Farlow v. Wachovia Bank of North Carolina, N.A.*, 259 F.3d 309, 313 (4th Cir. 2001) ("Resolution of factors as 'to whether an employment relationship or an independent contractor relationship was created' is 'a question of law.'"). As this Court stated in *Farlow*, "Resolution of factors as to 'whether an employment relationship or an independent contractor relationship was created' is a 'question of law.' **Merely because employee and independent contractor status is each supported by certain factors does not bar entry of summary judgment.**" *Id.* (*citation omitted*).

Based upon the evidence before the District Court, reasonable minds could not differ on whether Ebbets is an independent contractor. The undisputed facts established that Long and Foster

did not exercise sufficient control over the means and methods of Ebbets' work to transform the parties' intended independent contractor relationship into an employee relationship. The Hesses suggest that because there was some evidence supporting the non-dispositive factors relating to the *respondeat superior* issue (e.g., right to terminate, non-assignability, indemnification), the District Court should have submitted the issue to the jury. As the Fourth Circuit explained in *Cilceck v. INOVA Health System Services*, 115 F.3d 256 (4th Cir. 1997), however, if the material facts pertaining to the relationship are not in dispute, but only the **significance** of those facts as it pertains to the independent contractor issue, then the "resolution of that debate is a question of law." *Id.* at 261.

Contrary to the Hesses' contention that they were denied their right to a jury trial, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no issue for the jury to decide. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is not a "disfavored procedural shortcut." *Garrow v. Economos Properties, Inc.*, 406 F. Supp. 2d 635, 639 (E.D. Va. 2005). Rather, the summary judgment procedure is properly regarded as an "integral part" of the Federal Rules of Civil Procedure, which are designed to obtain a just, expeditious and inexpensive resolution of every civil matter. *Id.* A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party must do more than simply show that there is some metaphysical doubt as to the

material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson*, 477 U.S. at 247-48.

In light of the procedural posture of the case, the District Court properly ruled that Ebbets is an independent contractor as a matter of law. *See, e.g.*, *Veitch v. Jenkins*, 107 Va. 68, 57 S.E. 574, 575 (1907) (holding that "[t]he existence and character of the relation between [the plaintiff] and [the general contractor] depending on a written contract unambiguous in its terms, it was within the province of the court to construe the instrument, and as a matter of law to determine the relation between the parties."); *Stagg v. Taylor's Adm'x*, 119 Va. 266, 89 S.E. 237 (1916) (reversing entry of judgment in favor of plaintiff because the "evidence admits of only one conclusion" as to a subcontractor's status as an independent contractor); *MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 69, 387 S.E.2d 760, 762 (1990) (affirming trial court's judgment that as a matter of law the defendant could not be held liable for the negligent acts of an electrician, stating that "[w]hen the evidence and all reasonable inferences are viewed in the light most favorable to the [plaintiffs] reasonable minds must conclude that the [general contractor], acting through [the electrician], neither had, nor exercised the power to control the means and methods of [the electrician's] electrical work."); *Cilecek v. Inova Health System Servs.*, 115 F.3d 256, 261 (4th Cir. 1997) (finding that a physician who contracted to provide emergency medical services was an independent contractor as a

matter of law). Thus, the Fourth Circuit properly affirmed the District Court's granting of summary judgment in favor of Long and Foster.

II. Statutorily-Mandated Supervision Does Not Create an Employee-Employer Relationship

The Hesses[2] assert that a jury could have reasonably concluded that Ebbets was an employee of Long and Foster based upon the statutory and regulatory duties imposed on brokers to supervise real estate agents. As an initial matter, however, statutory interpretation is a pure question of law. *Young v. Commonwealth*, 273 Va. 528, 533, 643 S.E.2d 491, 493 (2007). Thus, a broker's statutory duty to supervise a real estate agent did not present a jury issue.

The District Court properly rejected the Hesses' statutory argument for two reasons. First, the statutory definition of "real estate sales person" expressly recognizes that a broker can have an independent contractor relationship with a real estate agent:

> [A]ny person, or business entity of not more than two persons unless related by blood or marriage, who for compensation or valuable consideration is employed either directly or indirectly by, or *affiliated as an independent contractor with*, a real estate broker, to

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[2] Schwinn did not assert this argument as a basis for his Motion for Partial Summary Judgment in the District Court and should not be permitted to do so on appeal.

> sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease, rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon.

VA. CODE ANN. § 54.1-2102 (*emphasis added*).

In fact, the Virginia Real Estate Board Licensing Regulations specifically contemplate that a real estate agent will act as an independent contractor. 18 VA. ADMIN. CODE § 135-20-10. If the Virginia General Assembly did not intend to permit a broker and a real estate agent to have an independent contractor relationship, the independent contractor language contained in the statutes and regulations would be superfluous. The language of the statute must be construed so as to give each word meaning, if possible. *Cook v. Commonwealth*, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004). If the Hesses' interpretation were correct, then no real estate agent could ever be considered an independent contractor because all real estate agents must be supervised by a broker pursuant to the applicable regulations. Thus, no reasonable inference can be made regarding Ebbets' status as an employee based upon these statutes and regulations.

Second, the District Court properly concluded that the Hesses "conflate[d] the duty of supervision with the power to control." (20a). Although Long and Foster had a duty to supervise its real estate agents, this duty did not extend to control over "the means and method of performing the work."

Moreover, Virginia's real estate regulations do not impose the type of control the Hesses suggest. As the District Court explained:

> Contrary to plaintiffs' suggestion, the Virginia statutory scheme does not create a *de facto* master-servant relationship between a real estate broker and a salesperson. Instead, these regulations set out broad boundaries within which salespersons may operate and place the onus on the brokers to ensure compliance. They do not, however, implicate the time, place, and manner in which a salesperson may solicit buyers, negotiate a deal, or execute an agreement. Whether a particular salesperson is an employee of a broker or affiliated as an independent contractor turns on the unique circumstances of the salesperson's relationship with his broker.

(21a).

While it is correct that under Virginia law, a real estate agent is required to associate with a licensed real state broker, these regulations do not change a real estate agent's status an independent contractor. *See, e.g., Locations, Inc. v. Hawaii Dept. of Labor and Industrial Relations*, 79 Hawaii 208, 215, 900 P.2d 784, 791 (1995) (holding that brokers' statutorily-mandated control over real estate agents does not create an employment relationship). For example, 18 VAC § 135-20-160(D) states that the supervising broker "shall exercise reasonable and

adequate supervision" of the real estate agents, and such supervision should include "the availability of the supervising broker . . . to review and discuss contract provisions, brokerage agreement provisions and advertising" and "the availability of training and written procedures and policies which provide, without limitation, clear guidance" in certain areas, including handling escrow deposits, compliance with federal and state housing laws, advertising, negotiating and drafting of contracts, etc. These regulations say nothing about control over the means and methods of the agents' work.

Although the Virginia Real Estate Board Licensing Regulations require all real estate agents to associate with a licensed real estate broker who is required by law to supervise the agent, the **nature** of the supervision does not affect the time, manner and method of how real estate agents perform their work. Instead, the responsibilities of a managing broker are to maintain the office operation and supervise real estate agents and administrative staff. The managing brokers act as an available resource in the office to assist or answer questions as needed. The managing brokers are not involved in the sales negotiation process. For example, Ebbets may independently negotiate the commission rate. Ebbets does not confer with the managing broker in drafting settlement documents. Managing brokers do not sign sales contracts. In fact, the managing brokers do not review sales contracts until after the contracts are ratified. The managing brokers only review contracts to ensure the contract language effectuates the buyer and seller's intent and complies with the law.

Real estate agents do not report to the managing brokers; nor do managing brokers keep track of the agents' schedules. Ebbets does not check in or check out with the managing brokers or anyone else at the beginning or end of each work day. According to Ebbets, the managing brokers exercise no meaningful supervision over the means and methods of his work.

> Q: Can you tell me, in general, . . . what kind of supervision your managing broker has provided to you?
>
> A: I really have no supervision. I come and go as I please and I don't come in sometimes, and I come in sometimes at six o'clock in the morning. I can do whatever I want. I've had no conflicts of any type, and I've had no supervision from any of the Long and Foster managers.
>
> Q: They don't supervise contracts or anything else in any other way?
>
> A: They get paperwork and initial off on it or sign off on it. And they may have a question for me, and say, I thought the man's name was John Q. Jones, and you put John P. Jones, and that kind of a thing. I'm never told to do anything.

Q: Are you ever told how you should go about sales or how you should go about marketing?

A: No.

Q: Are you ever told how you should go about contract presentations?

A: No.

While a broker may have a statutory duty to supervise a real estate agent, the broker's supervision does not involve the power to control the means or method of the agent's work. The degree of supervision exercised by Long and Foster's managing brokers over real estate agents is consistent with the real estate agents' independent contractor status. Thus, the District Court properly ruled that no reasonable jury could have concluded that Ebbets was an employee of Long and Foster based upon the statutory and regulatory duties imposed on brokers to supervise real estate agents.

III. Long and Foster Did Not Have the Power to Control the Means and Methods of Ebbets' Work

The doctrine of *respondeat superior* imposes liability on an employer for the negligent acts of its employees. *McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 81, 486 S.E.2d 299, 301 (1997). It is well-settled under Virginia law, however, that if the negligent acts were performed by an independent contractor, then no master-servant relationship exists and the putative employer is not

liable for the independent contractor's negligent acts. *Id.*; *Sanchez v. Medicorp Health System*, 270 Va. 299, 618 S.E.2d 331 (2005); *Norfolk & W. Ry. Co. v. Johnson*, 207 Va. 980, 154 S.E.2d 134 (1967); *Smith v. Grenadier*, 203 Va. 740, 127 S.E.2d 107 (1962).

There are four factors that must be considered in determining whether an individual is an employee or an independent contractor: (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual. *McDonald*, 254 Va. at 81, 486 S.E.2d at 301. **The fourth factor, the power to control, is determinative.** *Id.* (*citing Hadeed v. Medic-24, Ltd*, 237 Va. 277, 288, 377 S.E.2d 589, 594 (1989)). This factor refers to control over the means and methods of performing the work. *Baker v. Nussman & Cox*, 152 Va. 293, 147 S.E. 246 (1929). If only the result is specified, and the individual may adopt such means and methods as he or she chooses to accomplish the result, then that individual is an independent contractor. *Craig v. Doyle*, 179 Va. 526, 531, 19 S.E.2d 675 (1942). Long and Foster does not dispute the Hesses' contention that the actual exercise of control is not required, only the right to exercise control; however, the Court must evaluate Long and Foster's right to control as it existed at the time of the accident. *Coker v. Gunter*, 191 Va. 747, 750, 63 S.E.2d 15, 16 (1951).

A. The Independent Contractor Agreement Defined the Relationship Between Ebbets and Long and Foster

It is customary in the real estate industry for brokerage firms to enter into independent contractor agreements with real estate agents. *Long & Foster Real Estate, Inc. v. NRT Mid-Atlantic, Inc.*, 357 F. Supp. 2d 911, 913 (E.D. Va. 2005). Consistent with this uniform practice, the express language of the Independent Contractor Agreement in the instant matter illustrates the unambiguous intent of Long and Foster and Ebbets with respect to Ebbets' status as an independent contractor. The Independent Contractor Agreement expressly states that Ebbets "is under the control of Broker as to the result of Associate's work only, and not as to the means by which such result is accomplished." In fact, when asked to characterize his relationship with Long and Foster, Ebbets admitted that he is an independent contractor, stating, "I'm an independent contractor and I get to work in a Long and Foster office." The Long and Foster Policy Manual also emphasizes that real estate associates are independent contractors, not employees:

> A real estate associate affiliated with Long & Foster whose personal income is derived from the commissions of the listing, sale or leasing of real estate is an **independent contractor**. As an independent contractor, each associate may establish his or her own hours and methods of working without control or direction from Long & Foster. Long &

> Foster associates will be supervised and assisted, in accordance with state regulatory requirements, by Branch Managers and Principal Brokers. This supervision shall not be deemed nor construed to create an employer/employee relationship.

(JA 892) (*emphasis in original*).

The Hesses argue that Long and Foster's Policy Manual imposes restrictions on Ebbets. As detailed below, however, these controls do not relate to the means and methods of Ebbets' work. Moreover, Clause Eighteen of the Independent Contractor Agreement explicitly states that if there is a conflict between the Agreement and the Policy Manual, the Agreement shall control. Thus, to the extent that the Policy Manual could be construed as controlling Ebbets' work, the Agreement expressly provides that Long and Foster shall have no such control over Ebbets.

The Hesses contend that the District Court gave undue significance to the parties' intent and understanding of their relationship. Courts have found the parties' intent, as evidenced by the applicable contract language, to be a persuasive factor in support of a party's independent contractor status. *See, e.g.*, *Mangram v. General Motors Corp.*, 108 F.3d 61, 63 (4th Cir. 1997) (holding that a Memorandum of Understanding specifically providing that plaintiff was not an employee contributed to finding independent contractor status); *Adcock v. Chyrsler Corp.*, 166 F.3d 1290, 1293 (9th Cir. 1999) (affirming summary judgment

in favor of defendant where the contract contained clear language that the plaintiff would be considered an independent contractor, not an employee); *Walker v. Johnson*, 278 Ga. App. 806, 813, 630 S.E.2d 70, 76 (2006) (stating that "[w]here the contract of employment clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control.").

The Fourth Circuit has previously held that the parties' actual understanding of their working relationship is another factor that should be considered in determining whether an employment relationship was intended. *Farlow*, 259 F.3d at 314 – 315; *Cilecek*, 115 F.3d at 261; *Robb*, 80 F.3d at 893; *see also Restatement (Second) of Agency* § 220(2)(i) ("In determining whether one acting for another is a service or an independent contractor," the fact of "whether or not the parties believe they are creating the relation of matters and servant" is considered.).

The District Court properly considered the Independent Contractor Agreement to determine the intent of the parties to establish an independent contractor relationship rather than an employer/employee relationship. *Richmond Newspapers, Inc. v. Gill*, 224 Va. 92, 98, 294 S.E.2d 840, 843 (Va. 1982) (concluding that a route carrier was an independent contractor based upon the parties' written contract). In reference to the provision of the Independent Contractor Agreement that sets forth the nature of Long and Foster's control over how Ebbets performs his work, the District Court correctly concluded that Long and Foster had no authority to control the performance

of Ebbets' work, stating that the Independent Contractor Agreement demonstrated a "hands-off association" which is "the *sine qua non* of an independent contractor relationship." (23a).

B. Real Estate Agents are Independent Contractors Under the Proper Application of the "Control" Test

Real estate agents are consistently treated as independent contractors under federal and state law. Real estate agents are not afforded the protections under anti-discrimination statutes that are available to employees. *See, e.g., Kakides v. King David Agency, Inc.*, 283 F. Supp. 2d 411 (D. Mass. 2003) (granting defendant's motion for summary judgment on real estate broker's Title VII claim against real estate agency, finding that the broker was an independent contractor). Moreover, both the Virginia Workers' Compensation Act and Internal Revenue Code specifically exclude real estate agents from the definition of employee if their remuneration is based on sales rather than number of hours worked and their contract provides that the agent will not be treated as an employee for federal tax purposes. VA. CODE ANN. § 65.2-101; 26 U.S.C. § 3508.

Ebbets would not be considered an employee under these statutes because he was paid on a commission basis, his written contract designated him as an independent contractor, and the contract provides that he was not an employee for federal and state tax purposes. Ebbets' IRS 1099-MISC forms demonstrate that Ebbets was compensated as a non-

employee and Long and Foster did not withhold any income, FICA, FUTA, or federal or state taxes from Ebbets' commissions. Although these factors are not dispositive, "[t]he parties' tax treatment of the employment relationship is highly indicative, and may even constitute a 'virtual admission' of the hired party's status." *Tagare v. NYNEX Network Systems Com.*, 994 F. Supp. 149 (S.D. N.Y. 1997); *Aymes v. Bonelli*, 980 F.2d 857, 862 (2d Cir. 1992) (holding that failure of hiring party to pay payroll taxes or withhold income taxes as "highly indicative that [hired party] was considered an outside independent contractor.").

Even though (1) the Independent Contractor Agreement expressly states that Ebbets shall be treated as an independent contractor, (2) Ebbets has considered himself an independent contractor with Long and Foster for the last seven years, and (3) during that time he has received none of the benefits or protections that are afforded to employees under federal and state law, the Hesses still contend that Long and Foster should be held liable for Ebbets' alleged negligent acts under a theory of *respondent superior*. Not only does this argument ignore the parties' contractual intent pursuant to the Independent Contractor Agreement and the substantial body of federal and state statutes and regulations treating real estate agents as independent contractors, it is contrary to the undisputed facts of this case, which establish that Long and Foster exercised no control over the means and methods of Ebbets' work.

To transform Ebbets from an independent contractor into an employee, the Hesses must show

that the amount of control exercised by Long and Foster was substantial. The application of this "control" test is aptly illustrated by *MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 387 S.E.2d 769 (1990). In *MacCoy*, the Supreme Court of Virginia held that the trial court correctly determined as a matter of law that an electrician was an independent contractor for whose negligence a general contractor was not responsible. The general contractor provided the electrician with all materials and told the electrician what appliances, fixtures outlets and switches were to be installed and their location. The general contractor decided which of the twenty-two houses the electrician would work on each day and set the completion dates. The general contractor was present on the job site every day and if the work appeared to be unsatisfactory, he had the option to terminate the electrician.

Even so, the Supreme Court of Virginia concluded that that the electrician was an independent contractor as a matter of law, stating that "[n]one of these facts, however, even when taken together, would justify an inference that [the general contractor] had the power to control the means and methods of [the electrician's] work." 239 Va. at 68, 387 S.E.2d at 762. Instead, the Court reasoned, the general contractor "merely prescribed what the results should be," and the electrician "was free to adopt and employ the means and methods necessary to accomplish the prescribed results." *Id.* Accordingly, the Court concluded that even viewing all evidence and reasonable inferences in a light most favorable to the plaintiffs, reasonable minds must conclude that the electrician was an independent contractor.

Numerous courts in other jurisdictions have held that real estate agents are independent contractors under the control test even if the brokers exercise some degree of control because the agents are paid by commission, use their own vehicles, set their own hours, and are dependent on their own efforts to sell real estate. For example, in a factually similar case, *Eads v. Kinstler Agency, Inc.*, 929 S.W.2d 289 (Mo. App. 996), the plaintiff filed an action against a real estate agent and a real estate agency to recover damages for personal injuries resulting from an automobile collision with the agent. At the time of the accident, the agent, whose license was associated with the brokerage, was going to see a customer about a listing. However, the brokerage did not require the agent to keep regular work hours or perform any services at the agency's office. The agent furnished her own transportation and she did not receive an allowance or reimbursement for use of her automobile. The agent also had "entire discretion" in handling leads and prospects and as to the means of securing listing and consummating negotiations. Moreover, the "Broker and Salesperson Agreement" between the agent and the agency stated that the agent was to be treated as an independent contractor and not as an employee for tax purposes. Under the facts, the Missouri Court of Appeals held that the trial court did not err in granting the agency's motion for summary judgment on the grounds that the agent was an independent contractor for whose negligence the agency could not be held liable. *Id.* at 292.

Similarly, in *Verdecchia v. Douglas A. Prozan, Inc.*, 274 F. Supp. 2d 712 (W.D. Pa. 2003), the United States District Court for the Western District of

Pennsylvania granted summary judgment in favor of a real estate firm and its individual owner, finding that the defendants were not "employers" under the Americans with Disabilities Act or Age Discrimination in Employment Act because their real estate agents were independent contractors under the control test. *Id.* at 722. In making this finding, the Court noted that the Broker-Salesperson Contract designated the salesperson as an independent contractor. *Id.* at 721. The real estate agents were responsible for their own disability insurance, public liability and property damage insurance, and errors and omissions insurance. *Id.* The agents had no set hours and did not have to account for their time; nor did they have any "floor time" requirements in the office. They were paid on a commission basis and no taxes were withheld from their pay. *Id.* at 722. Although the firm provided agents with a desk and office supplies, the agents were not given an expense account or an allowance. *Id.* Although advertising was done through the real estate firm, the agents were responsible for ensuring that the listed properties were advertised. The agents had to pay for special advertising, certain individual marketing expenses, and distribution of marketing materials. Given these facts, the *Verdecchia* Court held that there was no genuine issue of material fact that the agents were independent contractors, not employees, and, therefore, summary judgment on the ADA and ADEA claims in favor of the defendants was appropriate. *Id.* at 724.

In other cases where the real estate broker exercised even more control over the real estate agent, courts have still found the real estate agent to

be an independent contractor as a matter of law. In *Stetka v. Hunt Real Estate Corp.*, 859 F. Supp. 661 (W.D.N.Y. 1994), Hunt required the plaintiff, a real estate agent, to work "floor time" in the office twice a week for a two-hour period. She was also required to attend weekly sales meetings and house tours. Hunt provided the real estate agents with scripts in speaking with potential clients. *Id.* at 667. It also conducted performance evaluations of the agents. *Id.* at 664. On the other hand, the Court noted that the plaintiff signed an Independent Contractor Agreement, paid her own fees, and her time at work (other than floor time) was "unstructured." The plaintiff was also paid by commission, and Hunt did not make any deductions for federal or state taxes. *Id.* The Court held that these factors established that the plaintiff worked autonomously, with minimal requirements from Hunt, and therefore, the plaintiff was an independent contractor as a matter of law, not an employee entitled to bring an action for sex discrimination under Title VII.

Likewise, in another real estate agent case, *Breen v. Hunt Real Estate Corp.*, 1994 WL 417017 (W.D. N.Y. 1994), the United States District Court for the Western District of New York held that there was no genuine issue of material fact as to the plaintiff's status as an independent contractor, even though (1) the plaintiff was not allowed to work for another real estate broker while she was working for Hunt; (2) she was required to serve "floor time" in the office twice a week and attend sales meeting and house tours; (3) Hunt had authority to rewrite her sales contracts; (4) Hunt placed and paid for advertisements in the newspaper and other publications promoting sales of listings from its sales

associates; and (5) Hunt provided the plaintiff with business cards, a computer, a telephone, microfiche, office supplies and a desk.

As in *Stetka*, the *Breen* Court still found that Hunt did not exercise sufficient control over the plaintiff to create an employment relationship. Specifically, the Court noted that the plaintiff did not have a schedule of working hours other than floor time, she was required to pay her own fees and business expenses, she marketed her own listing, she was expected to develop her own business leads, she was paid on a commission basis, no taxes were deducted from her gross commission payments, and she was not covered by a worker's compensation policy. Therefore, the Court concluded that the plaintiff did not have an employment relationship with Hunt and granted the defendant's motion for summary judgment. *Id.* at *7.

Lastly, in *Krijn v. Pogue Simone Real Estate Co.*, 752 F. Supp. 102 (S.D.N.Y. 1990), *aff'd without opinion*, 930 F.2d 910 (2d Cir. 1991), the Court dismissed the plaintiff's Title VII action on the ground that she was an independent contractor. Although Pogue Simone required attendance at weekly sales meetings and periodic attendance in the office, the Court noted that the plaintiff was paid on a commission basis and the defendant did not control the plaintiff's day-to-day hours or details of the plaintiff's real estate work. Because the defendant broker retained only minimal control over its real estate agents, the plaintiff was an independent contractor. *Id.* at 104.

The instant matter is indistinguishable from *Eads*, *Verdecchia*, *Stetka*, *Breen* and *Krijn*. Ebbets is not required to maintain a fixed schedule or a minimum number of hours of work. In fact, Ebbets testified that Long and Foster imposes no minimum requirements on real estate agents concerning hours or sales:

> Q: Does Long and Foster have any requirements in order to maintain the relationship with them relative to time in the office, sales, or anything of that nature?
>
> A: No.
>
> Q: So you could have your license with them and essentially not show up in the office for six months, have one listing, and continue to keep your license with them?
>
> A: Yes.

Long and Foster does not limit the counties in which Ebbets may list or sell properties. In addition, Long and Foster does not direct the methods Ebbets uses to list or show properties, other than requiring real estate agents to comply with the applicable law. Long and Foster does not dictate how Ebbets spends his work day. Nor is Ebbets required to attend any sales training or other meetings. Ebbets was free to come and go as he pleased, and how he worked an

existing listing or marketed a new listing was within his sole discretion:

> Q: Did Long and Foster dictate what you would do during your work day?
>
> A: No.
>
> Q: So you were free to decide whether you were going to work on an existing listing or to secure a new listing?
>
> A: I could do whatever I wanted to do.
>
> Q: And did Long and Foster, at all, dictate the means or methods that you – of how you would work an existing listing or market a new listing?
>
> A: No.

The Hesses assert that the District Court failed to consider the inferences that could be drawn from the fact that Long and Foster's relationship with Ebbets was terminable at will; however, this factor is not determinative.[3] For example, in *Stith v.*

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[3] The issues of non-assignability and indemnification are also not determinative. In addition, the District Court correctly held that the existence of the indemnification and insurance provisions in the Agreement were indicative of an independent contractor relationship, as Long and Foster has an interest in protecting itself from exposure in lawsuits based upon the actions of its independent contractors.

Thorne, 488 F. Supp. 2d 534 (E.D. Va. 2007), the Court recited the factors to be considered in determining whether employment relationship exists and concluded that the power of dismissal factor is "not essential to the existence of the relationship; the fourth, the power of control is dispositive." 488 F. Supp. 2d at 550; *accord Cilecek*, 115 F.3d at 262 (affirming the district court's grant of summary judgment in favor of the employers on the independent contractor issue, finding that the right to terminate was not indicative of the relationship). In evaluating the evidence presented on the issue of power of control, the District Court found that this issue was dispositive. Accordingly, the fact that Long and Foster could terminate Ebbets did not present a material issue of fact that would preclude summary judgment in favor of Long and Foster.

Although Ebbets was provided with Long and Foster's Policy Manual and was required to acknowledge receipt of the same, the mere existence of a policy manual does not, in and of itself, create a master-servant relationship. In *Bartlett v. Northside Realty Associates, Inc.*, 191 Ga. App. 10, 380 S.E.2d 744 (1989), the Georgia Court of Appeals concluded that the policy manual did not alter a real estate agent's status as an independent contractor. In *Bartlett*, the agents were directed to follow the policies contained in the written policy manual and the broker had the right to sever its relationship with salespersons who failed to abide by those policies. However, in affirming the trial court's decision granting summary judgment in favor of the broker on the *respondeat superior* issue, the court found that the policies in the manual did not control "the time, manner and method of performance," and

any other alleged indicia of control were "so inconsequential when viewed in light of the evidence to the contrary to establish no genuine issue of fact." *Id.* at 746.

Thus, the District Court correctly characterized the issue in this case as not whether Long and Foster had *any* administrative policies and procedures, but whether Long and Foster's policies and procedures exerted control over the means and methods of Ebbets' work, as opposed to the results of that work. *See, e.g., Walker v. Johnson*, 278 Ga. App. 806, 813, 630 S.E.2d 70, 76 (2006) (distinguishing between the right to control the salesperson's "time, manner and method of executing the work" from the "right to merely require certain definite results in conformity to the contract."). As the Fourth Court explained in *Farlow*, the "right to control" issue pertains to the degree of control over the services rendered, not the "peripheral, administrative details which were incidental to the rendering of . . . services." 259 F.3d at 313 (*citing Robb v. United States*, 80 F.3d 884, 889 (4th Cir. 1996)). Similarly, in *Cilecek*, a case involving a contract physician who provided emergency medical services to hospital, this Court affirmed the district court's grant of summary judgment in favor of the employers on the grounds that the physician was an independent contractor, even though the physician was required to adhere to the hospital rules and regulations which regulated the physician's work in "substantial detail." 115 F.3d at 261.

Ebbets' success as a real estate agent is entirely dependent upon his own initiative, efforts and skill. He works on his own time and at his own

expense, deriving his remuneration from the results of his work. Therefore, the evidence in this case leads to only one conclusion: Ebbets is an independent contractor, not an employee. Ebbets has the freedom to operate his real estate business when and how as he sees fit without interference from Long and Foster.

Applying the four-prong control test established by the Supreme Court of Virginia in *McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 486 S.E.2d 299 (1997), the Hesses concede that Ebbets was paid by commissions only, which is a strong indication of his status as a non-employee. Instead, the Hesses rely on two of the four prongs, noting that Long and Foster has the option to engage or terminate a real estate agent. However, only the fourth prong, the power to control, is determinative. *McDonald*, 254 Va. at 81, 486 S.E.2d at 301.

This is a critical distinction because the Long and Foster "controls" identified by the Hesses have no effect on the real estate agent's means and methods of performing his work. For example, policies and procedures concerning parking, how money should be deposited, maintenance of errors and omissions insurance, the use of Long and Foster's logo, the ownership of records, files or correspondence, shutting off the office lights, etc., do not alter the means and methods Ebbets used to sell or list properties.

Other Long and Foster "controls" relied upon by the Hesses are merely suggestions or recommendations, or an incorporation of the applicable law. For example, although Long and

Foster reserves the right to approve advertising to ensure compliance with applicable law, real estate regulations and ethical standards, the means and methods of advertising is still within the discretion of the real estate agent. In fact, there is no requirement that real estate agents must advertise *at all*.

In support of their position, the Hesses rely on a Virginia circuit court case, *Steffan v. Freemason Assocs., Inc.*, 60 Va. Cir. 216 (2002) (Norfolk). *Steffan* is contrary to the common law in several respects. First, many of the factors identified by the court as an indication of RE/MAX's control over its agents were provisions required by law. Second, the *Steffan* opinion fails to properly distinguish control over the means and methods of the agents' work, as opposed to the results of the agents' work. Third, the court failed to give proper weight to the treatment of a real estate agent in the operative documents, which is a strong indication of the agent's independent contractor status. *See, e.g., Mangram v. General Motors Corp.*, 108 F.3d 61, 63 (4th Cir. 1997); *Adcock v. Chyrsler Corp.*, 166 F.3d 1290, 1293 (9th Cir. 1999); *Walker v. Johnson*, 278 Ga. App. 806, 813, 630 S.E.2d 70, 76 (2006).

Steffan is a circuit court opinion, and the numerous and more well-reasoned opinions from the Supreme Court of Virginia and federal courts cited by Long and Foster are based upon facts nearly identical to this case. In fact, even in cases where the broker exercised more control over its real estate agents than Long and Foster exercises over its agents, courts have still found the real estate agent to be an independent contractor as a matter of law. *Eads v. Kinstler Agency, Inc.*, 929 S.W.2d 289 (Mo.

App. 996); *Verdecchia v. Douglas A. Prozan, Inc.*, 274 F. Supp. 2d 712 (W.D. Pa. 2003); *Stetka v. Hunt Real Estate Corp.*, 859 F. Supp. 661 (W.D. N.Y. 1994); *Breen v. Hunt Real Estate Corp.*, 1994 WL 417017 (W.D. N.Y. 1994); *Krijn v. Pogue Simone Real Estate Co.*, 752 F. Supp. 102 (S.D. N.Y. 1990), *aff'd without opinion*, 930 F.2d 910 (2d Cir. 1991). Accordingly, given the absence of any controls on the "means and methods" of Ebbets' work, the District Court correctly ruled that Ebbets is an independent contractor as a matter of law.

CONCLUSION

The Petitioners present no compelling reason for this Court to review this case. Accordingly, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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No. 09-1423

JUL 26 2010

In The

Supreme Court of the United States

HORST SCHWINN, Guardian of Doerte Hesse and
MARCUS HESSEE, Guardian of Josef Hesse,

Petitioners,

v.

CHARLES STEPHEN EBBETS
and
LONG AND FOSTER REAL ESTATE, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI AS TO NEW ISSUES RAISED BY RESPONDENT

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375 U.S. 824, 84 S. Ct. 65,
11 L. Ed. 2d 57 (1963) 2

LAW AND ARGUMENT

The Respondents, Long and Foster Real Estate, Inc. (Long and Foster) raises new matters in its Brief in Opposition to the Petition for a Writ of Certiorari.

Long and Foster argues that because the Plaintiff's sought Summary Judgment in the trial court that it should be barred from now claiming that it should not be entitled to complain about the Summary Judgment granted Long and Foster. However, Plaintiffs in the trial court alleged they were entitled to summary judgment as a matter of law because Long and Foster was required by statute and Virginia Regulations to supervise its salesman, particularly in this case Charles Stephen Ebbets. Plaintiffs also argued that despite that the evidence was overwhelming from the evidence that Long and Foster had the **power** to control Mr. Ebbets, irrespective of whether it chose to control him and that it had a duty to control him, making him its servant for purposes of respondeat superior.

Plaintiff's also contended that in the event the Court did not agree with them that they were entitled to Summary Judgment on those issues that it was then a jury issue. Further when prompted by the trial court, Plaintiff's conceded that the raw facts were not in dispute, but the interpretation of those facts or the reasonable inferences from those facts were in substantial dispute. The fact that both parties have opposing motions for summary judgment does not establish that there is no issue of fact nor does it require that summary judgment be

granted one of the parties. "Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences drawn from them." *S.J. Groves & Sons Co. v. Ohio Turnpike Comm.*, 315 F.2d 235, 237 (6th Cir. 1963) cert. denied, 375 U.S. 824. A party may concede there is no issue if his theory is accepted and yet maintain that if it is not then there are genuine issues of material fact in controversy. *Hindes v. United States*, 326 F.2d 150 (5th Cir. 1964).

In the 4th Circuit when queried about the application of the law and regulations requiring Long and Foster to supervise and control Mr. Ebbets as being dispositive, the Plaintiffs agreed that under Virginia law it was not determinative but an issue for the fact finder (jury) to consider. Statutorily mandated supervision is a factor to be considered by a jury in determining if one is an employee for purposes of tort liability (respondeat superior). *See Morvillo v. Shenandoah Memorial Hospital*, 547 F. Supp. 2d 528 (W.D. Va. 2008) and subsequent at 2008 U.S. Dist LEXIS 68595 (Sept. 10, 2008, W.D. Va.).

Too, Respondents fail to grasp the fundamental argument of the Plaintiff's that the Constitutional right to a jury trial is abridged (at least when as applied to a common law civil cause of action) where the reasonable inferences which can be taken from undisputed basic facts are divergent and could support either finding. In that case to deprive a party of a jury determination when prayed for (as hereinbefore) is a deprivation of fundamental rights under the Constitution.

Though Plaintiffs take issue with other arguments raised by Long and Foster, they cannot maintain that they really address new issues and therefore, consistent with the Rules of Court will not here attempt to address those issues.

CONCLUSION

This Court ought to grant this Petition for a Writ of Certiorari to define the bounds of summary judgment in a world where the common man is often denied his day in court and his day before a jury of peers as provided by the constitution in the interest of expediency. It is easy for a trial judge to substitute his or her judgment for that of a juror. All persons bring to their view of the world their disparate experiences and often we cannot reconcile how others have a different view, but that is to be protected when a jury rather than a judge decides issues which are subjective, which are subject to interpretation of facts, which are subject different view of the world as comes from the experience of different jurors. This Court should draw a line so it makes clear that though basic facts may not be in dispute, where they are subject to different interpretation, different conclusion and different inference, those cases are not appropriate for summary judgment and deserve the right to a jury trial.

Respectfully submitted,

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